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SUPREME COURT OF THE UNITED STATES.

TERM No. 828. **OCTOBER TERM 1894.**

In Error to the Court of Appeals of State of Maryland.

THE POSTAL TELEGRAPH CABLE COMPANY
Plaintiff in Error.

vs.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Defendant in Error.

Defendant-in-Error's Brief on Motion to Dismiss and Affirm.

THOMAS G. HAYES,
City Counselor for Baltimore,
WILLIAM S. BRYAN, JR.,
City Solicitor for Baltimore,
Counsel for Defendant in Error.

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Defendant in Error.

DEFENDANT-IN-ERROR'S MOTION TO DISMISS AND AFFIRM.

The Defendant in Error moves the Court—

1st. To dismiss the writ of error in this cause for want of jurisdiction.

2d. To affirm the judgment of the Court of Appeals of Maryland, with ten per cent. damages, because it is manifest that the appeal is frivolous and merely taken for delay.

THOMAS G. HAYES,
City Counselor for Baltimore,
WILLIAM S. BRYAN, JR.,
City Solicitor for Baltimore,
Counsel for Defendant in Error.

Defendant-in-Error's Brief on Motion to Dismiss and Affirm.

STATEMENT.

This was an action at law brought by the public municipal corporation of the city of Baltimore, in the State of Maryland, defendant in error, against The Postal Telegraph Cable Company, plaintiff in error, a corporation created under the laws of the State of New York, in the Court of Common Pleas of Baltimore City, a Court of original common law jurisdiction, to recover the sum of $1,018.00, with interest from the 15th day of June, 1893, the same being an annual rental fee for the use of the streets of Baltimore, of $2.00 per pole, for 509 telegraph poles, which were owned by the plaintiff in error, and located in and occupying a portion of the public streets of Baltimore. The said rental fee was the amount prescribed by Ordinance No. 86 of 1893 to be paid by all companies which owned and had located in the streets of Baltimore, similar poles and similarly used.

The said ordinance was passed by the City Council of Baltimore, the same being the legislative branch of the government of said city, and approved by the Mayor, the chief executive officer of the city, and was entitled:

> "An ordinance to provide for the regulation of the use of the streets, lanes and alleys of the city, by telegraph, telephone, electric light and other poles, and to fix the charge for the same."

The sole object and purpose of the ordinance, as appears from its provisions, were to charge the companies named a rental for the use of the public streets of Baltimore by their poles, and the charge is in no sense a tax or business license or license charge for supervising the poles.

The entire text of the ordinance is given and attached to this brief in appendix, and marked "Exhibit A."

The suit, after it was commenced in the Court of Common Pleas, was removed to the United States Circuit Court for District of Maryland, by the plaintiff in error, and remanded by that Court, on the motion of the defendant in error, on the ground that the amount in dispute was below the juisrdiction of that Court.

On the return of the record to the State Court, a demurrer was interposed by the defendant in error to the pleading filed in the Federal Court by the plaintiff in error, prior to the remand of the cause.

On this demurrer, a *pro forma* judgment was entered by the Court below, in favor of the defendant in error, overruling the plea, and rendering judgment for the amount claimed, with interest. From this judgment the plaintiff in error appealed to the Court of Appeals of Maryland, which Court affirmed the judgment below, and from this judgment this writ of error is brought The full opinion of Court of Appeals is given in Appendix, marked "Exhibit B."

The plaintiff in error, to the declaration, as before stated, filed a paper writing intended for a plea, but which, under the practice and procedure of Maryland, partook more of the nature of an answer in equity and is fatally defective, as a plea at common law, and demurrable.

This paper writing violated almost every rule of sound pleading. It consisted largely of matter of argument. If it presented any defense at all, it presented several distinct defenses, and was, therefore, bad for duplicity. It was also an inartificial attempt to plead a general denial, and was, therefore, bad as being tantamount to the general issue. In Maryland, the common law prevails, as to pleading.

The purpose of the paper writing so filed, was, among other things, to attack the validity and constitutionality of the ordinance in question, and assigned some twenty-five reasons for the same.

The grounds assigned in said paper writing, which solely could involve a Federal question, are as follows:

1. That the plaintiff in error was engaged in the telegraph business of sending and receiving messages from and through sundry States of the United States; that it accepted the provisions of the Act of Congress, of July, 1866 (now Title 65 of the U. S. Revised Statutes), and that the defendant in error had no power to impose upon said company a specific fee upon each pole owned by the plaintiff in error, and located in the streets of Baltimore, and that the ordinance in question is *ultra vires*.

2. That the amount charged as the rental fee, to wit: $2.00 per pole "is largely in excess of any reasonable fee for the license and care of said city for the regulation of said poles and wires and the labor attending the supervision and regulation of the same by the city authorities, the amount of said tax being, at least, ten times the cost of attending the supervision and regulation of said kind of property by the city authorities."

The defenses to the action set up by the plaintiff in error do not anywhere, either directly or indirectly, claim that the charge as a rental fee for the use of the area of the public streets of Baltimore, occupied by the plaintiff-in-error's poles, is not a reasonable charge.

The mistaken contention of the plaintiff in error is that the rental fee charged by the ordinance, for the use of the city's streets, is a tax or license on its business, or a license charge for supervising the poles, and that hence it is void because it is tax or business license or an excessive license charge on an instrumentality of interstate commerce.

Neither the ordinance itself nor the construction of the ordinance by the Court of Appeals of Maryland, sustains this contention. The title of the ordinance, the language of the body of the ordinance, and the opinion of the Maryland Court, clearly show it to be solely a rental charge for the use of the streets of Baltimore by the poles of plaintiff in error, and not a tax or license of any kind.

ARGUMENT.

I.

On motion to dismiss:

The Court of Appeals of Maryland bases its decision in this case, affirming judgment below, wholly on the defective pleading of the plaintiff in error. The Federal question was not involved in its decision except incidentally. It was not necessary for the State Court's decision.

The Court of Appeals, in referring to the defective plea of plaintiff in error, says:

> "The answer filed by the defendant seems to be framed on the model of equity proceedings. Both in form and substance, it is in absolute disregard of the practice prevailing in this State, and was necessarily held bad on demurrer."
>
> (See Appendix, "Exhibit B.")

The Court then proceeds to give its opinion sustaining the constitunality of the ordinance in question. Its decision, however, entirely independent of the ordinance, was based on the sustaining of the demurrer to the plaintiff-in-error's defective plea.

It is not enough to give this Court jurisdiction over the judgment of a State Court, for the record to show that a Federal question was argued or presented to that Court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, *or that the judgment could not have been given without deciding it.*

Moore vs. Mississippi, 21 Wall. 638.
Bolling vs. Lessner, 91 U. S. 594.
Brown vs. Atwell, 92 U. S. 327.
State ex rel. vs. Board Liquidation, 98 U. S. 140.

II.

On the motion to affirm:

A. *The charge of two dollars per pole is a rental charge for the use of the streets of Baltimore, by the poles of plaintiff in* *error, and is in no sense a tax on the property or license on the business of defendant in error, or a license charge for supervising the poles.*

As has been seen from the previous "statement" of this brief, the Mayor and City Council of Baltimore, defendant in error, on April 20, 1893, passed an ordinance imposing a rental fee of two dollars per annum on each telegraph, telephone, electric light or other pole (except trolley poles used exclusively for stringing wires for use in the propulsion of street passenger cars) *used, possessed or maintained* on any of the streets, lanes or alleys of the city. (See Appendix, "Exhibit A.")

The appellant *used, possessed or maintained* 509 telegraph poles, and not paying the rental fee on them, as prescribed by ordinance, this suit was brought.

Upon an inspection of the ordinance in question, it is clearly seen that the purpose of the ordinance is simply to charge and collect a rent from all the companies named which use the streets of the City with their poles. This charge is clearly neither intended, nor is in fact or law, a tax or license on the business of the companies, or a license charge for supervising the poles. The title of the ordinance declares it to be "an ordinance to provide for the regulation of the USE of the streets, &c., by telegraph, &c., poles, *and to fix the charge for the same.*"

Charge for what? Charge for the use of the streets, not a tax or license.

Then, in the 2d section of ordinance it is provided:

> "That annually, between first day of June and fifteenth day of June, all persons and corporations shall pay to the City Comptroller a FEE of two dollars for each and every pole *used, possessed* or *maintained* by them in any of the *streets*, &c." * *

And again:

> "Upon receiving the said FEE, the Comptroller shall furnish the companies with a tin plate with number on it, &c."

Then in section 5, in prescribing the penalty, it is provided:

> "That any person, persons or corporation *using, possessing or maintaining* any telegraph * * or other poles in any of the *streets, lanes or alleys* of the city of Baltimore who shall fail to file, &c."

And again, in same section:

> "Or who, if belonging to the classes required to pay a FEE of two dollars on each pole, by the second section of this ordinance, shall fail to pay the said FEE, &c." (See Appendix, "Exhibit A.")

So that it appears that the ordinance both in its title and body, solely prescribes a rental *fee* for the privilege of using the streets of Baltimore with telegraph poles. This fee is graduated by the amount of such use. The business of the company has nothing to do with this charge. If the company purchased ground adjacent to the streets, and placed on it their poles, the charge would cease.

It is true that in the ordinance, in 2d section, where the Comptroller is directed to issue to the companies, paying the fee, tin plates with numbers on them, and also a written certificate stating the number of poles which have been paid for, the language of the ordinance, in referring to the fee of two dollars, is "license fee." But this by no possible construction can be taken to mean a tax or license on business, or a license to reimburse city of Baltimore for supervision of the poles. The whole context of the ordinance, especially its title, shows that the ordinance is to collect a rental charge for the use of the streets of Baltimore by the poles. If this is not true, what does the title of the ordinance mean when it uses the language "an ordinance to provide for the regulation of the USE of the streets, &c." * * * "*And to fix the charge for the same.*"

The word "*fee*" is used everywhere in the ordinance, except when inadvertently, in speaking of the numbered

tin plates and certificate as to payment, issued to company, it is preceded by the word "*license*."

In the case of St. Louis vs. W. U. Tel. Co., 148 U. S. 96, Mr. *Justice Brewer* with great clearness meets this identical contention of the telegraph company in that case. The ordinance had in it, as its express purpose, these words:

"*For the privilege of using the streets.*"

The ordinance in case at bar, has, as we have seen, for its express purpose, these words:

"*An ordinance to provide for the regulation of the use of the streets * * * of the city * * * by telegraph * * * and other poles, and to fix the charge for the same.*"

Language of identical import. Mr. *Justice Brewer* said on this point:

"And first, with reference to the ruling, that this charge was a privilege or license tax. To determine this question, we must refer to the language of the ordinance itself, and by that we find that the charge is imposed for the privilege of using the streets, alleys and public places, and is graduated by the amount of such use. Clearly this is no privilege or license tax. The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. 'A tax is a demand of sovereignty; a toll is a demand of proprietorship.'" * * *

If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the section could no longer have any application to it."

No part of this rental fee goes to the State as taxes, or to any county, but exclusively into the municipal treasury.

The fact that the city receives a revenue from this charge does not make it a tax. Mr. *Justice Brewer* in same case, on this point said:

> "That by it the city receives something which it may use as revenue, does not determine the character of the charge, or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes."

The defendant in error confidently claims that the contention of the plaintiff in error, that the charge of two dollars per pole is a tax or license on its business or license charge for supervision of the poles, has no support in the terms of the ordinance, but that the very language of the ordinance emphatically negatives this contention.

The language of the Court of Appeals in construing the ordinance is equally as emphatic in declaring the charge to be for the use or rental of the part of the streets occupied by the poles. Judge Bryan, speaking for the Court says:

> "It is not contended on the part of the plaintiff, that any State authority can prevent or hinder interstate commerce, *or that it can tax the receipts derived from it, or that it can require a license for carrying on the business, or the payment of a sum of money for such license.* The city ordinance does not exclude the telegraph company from the use of the street as postroads, on the contrary, it recognizes such use and exacts compensation therefor. The question arises whether such compensation can be lawfully demanded." * * * "The erection of a pole is the appropriation of a portion of a street, and the entire exclusion of the public from the use of it."
>
> (See Appendix, "Exhibit B.")

Judge Bryan then proceeds to declare the ordinance valid as a rental charge for the use of the streets.

Postal Telegraph Co vs. M. & C. C. of Baltimore, 29 Atl. Rep. 819.

See also—Appendix, "Exhibit B."

This construction of the State Court on the ordinance in question, as to its being a rental charge and not a tax or license, is conclusive on this Court.

This Court in a long line of cases has always held that the conclusion of the State Court as to the proper construction of the Statutes of a State or the ordinances of a municipality, is binding on it.

Green vs. Neal, 6 Pet. 291.
Davie vs. Briggs, 97 U. S. 628.
Railroad Co. vs. Mississippi, 133 U. S. 590.
Balto. Traction Co. vs. Balto. Belt R. Co., 151 U. S. 137.

B. *The rental charge of two dollars per pole is a reasonable rental charge for the use of that portion of the streets of Baltimore occupied by the poles of the plaintiff in error.*

This proposition is nowhere denied by the plaintiff in error. The sole contention of plaintiff in error is that the charge is a tax or license. If it were made an issue by the pleadings, this Court would have the positive declaration of the Court of Appeals that it was reasonable. *Prima facie*, the ordinance charge is reasonable. The Court of Appeals of Maryland speaking of the reasonableness of the charge says:

"The privilege of using the poles is granted on the payment of the sum of two dollars per annum for each pole. This is less than seventeen cents a month. Baltimore is a large and populous city. In the localities desirable for the telegraph offices the sidewalks are frequently thronged by large numbers of people, and the driveways so closely blocked with vehicles that it is a matter of peril and difficulty to cross from one side of the street to the other. In many other parts of the city the crowding of the streets is sometimes very great. It is a matter of much importance to preserve space for public convenience. If we take as a standard the rental value of ground fronting on public streets, we will see that seventeen cents a month for the space covered by a telegraph pole is a very small fraction of the value of its occupation, and it is a vastly smaller fraction of the compensation due for the inconvenience caused to occupiers of houses in the vicinity, and to persons using the streets in the ordinary methods of travel. The Mayor and City Council, however, with a wise and liberal forecast, have forborne to place burdens on industries and enterprises which accompany and increase the growth and prosperity of the city. *In our opinion the tax on these poles is reasonable.*"

Postal Telegraph Co. vs. M. & C. C. of Baltimore,
29 Atl. Rep. 819.

See also—Appendix, "Exhibit B."

C. *There is no discrimination in the rental charge of two dollars per annum on telegraph and the other poles. All poles of all companies similarly used are subject to this charge.*

The only exception in the ordinance is:

"Trolley poles used *exclusively* for stringing thereon, wires for use in propulsion of street passenger cars."

The reason of this exception is that these street railways, in addition to their property taxes and business license tax, pay to the defendant in error, for the use of the streets, nine per cent. of their gross receipts, (Code, art. 4, sec. 769, title "City of Baltimore," Public Local Laws), which is not paid by any of the companies named in ordinance in question, and subjected to the rental charge of two dollars per annum on their poles.

It would be a discrimination against the car companies if in addition to the nine per cent. on their gross receipts, which goes solely into the treasury of Baltimore, they should be compelled to pay the additional rental charge named in ordinance.

Mr. *Justice Brewer*, in 148 U. S. 98, on this point, said:

"In the illustration just made, in respect to a city hall, suppose that the city, in its ordinance fixing a price for the use of rooms, should permit persons who pay a certain amount of taxes to occupy a portion of the building free of rent, that would not make the charge upon others for their use of the rooms a tax. Whatever the reasons may have been for exempting certain classes of companies from this charge, such exemption does not change the character of the charge or make that a tax which would otherwise be a matter of rental."

III.

Baltimore has under its charter absolute control of its streets.

The Mayor and City Council of Baltimore, by its charter has had conferred on it complete and full power and control over the streets of the city of Baltimore.

Article 4, section 721, charter of Baltimore, Code Public Local Laws, title "City of Baltimore," provides that the Mayor and City Council:

"May pass ordinances * * * for promoting the great interests and good government of the city."

And again, the charter, in section 29, article 4, Code Public Local Laws, title "City of Baltimore," provides that:

"The Mayor and City Council shall have power to pass all ordinances to give effect and operation to all the powers vested in the corporation of the city of Baltimore."

Its charter also expressly provides for the very thing which is regulated in the ordinance in this case, in the following language:

"The Mayor and City Council of Baltimore shall have power to regulate the use of the streets, lanes and alleys in said city, by railway or other tracks, gas or other pipes, *telegraph*, *telephone*, *electric light or other wires and poles*, in, under, over or upon the same, and may require all such wires to be placed under ground, after such reasonable notice as they may prescribe."

Act 1890, chapter 370.

The completeness of this power and control by the city of Baltimore over its streets, has been repeatedly announced and declared by the Court of Appeals of Maryland.

Koch vs. North Av. Ry. Co., 75 Md. 229.
North Balto. P. Ry. Co. vs. North Av. Ry. Co., 76 Md. 239.
Lake Roland E. Ry. Co. vs. M. & C. C. Balto., 77 Md. 357.

In the Lake Roland E. Ry. Co. case, *supra*, the Court of Appeals of Maryland, said:

> "It has been for a long time recognized as the law that the Mayor and City Council of Baltimore have full and complete control over the streets and highways of the city."

In the case at bar, the Court of Appeals said:

> "The power of the Mayor and City Council of Baltimore over the streets cannot be regarded as within the region of debate."

Postal Telegraph Co. vs. M. & C. C. Balto., 29 Atl. Rep. 819.

See also—Appendix, "Exhibit B."

IV.

The ordinance in question was based on and passed after the opinion of the Supreme Court of United States was delivered in St. Louis vs. W. U. Tel. Co., 148 U. S. 92 and 149 U. S. 465, and upon the strength of that case the defendant in error relied in the Court of Appeals of Maryland and now relies in this Court.

It is respectfully submitted that the ordinance in question is in strict conformity with the case of St. Louis vs.

W. U. Tel. Co., *supra.* The Court of Appeals of Maryland at length reviews that case and points out the propriety of the ordinance in question on the strength of it.

The legality of the ordinance in question will clearly appear upon a reference to some of the views of this Court as expressed in that case.

At page 101 of 148 U. S., JUSTICE BREWER says:

> "While for the purposes of travel and common use, they (public streets) are open to the citizens of every State alike, and no State can by its legislation deprive the citizens of another State of such common use, *yet when an appropriation of any part of this public property to an exclusive use is sought,* whether by a citizen, a corporation of the same or another State, or a corporation of the national government, *it is within the competency of the State representing the sovereignty of the local public to exact for its benefit compensation for this exclusive appropriation.*"

And in overruling the suggestion that under the Acts of Congress, in regard to postroads, etc., there was an immunity from taxation, * * or the right to use the public highways of a State, he added:

> "It is a misconception, however, (148 U. S. 100) to suppose that the franchise or privilege granted by the Act of 1866 carries with it the unrestricted right to appropriate the public property of a State, * * * while a grant from one government may supersede and abridge franchises and rights held at the will of the grantor; it cannot abridge any property rights of a public character created by the authority of another sovereignty."

He then states that no one would suppose that any grant from the Federal government would give the grantee the right to take *private* property belonging to any individual without compensation, and shows that the same principle applies in cases where *public* property, belonging to the local government, State or municipal, is appropriated.

In the opinion on the motion for the re-argument of this same case of St. Louis vs. Western Union Telegraph Company (149 U. S. 467,) the Court, through the same justice, vindicates the proposition stated in the former opinion:

> "That the city of St. Louis has full control of its streets in this respect, and represents the public in relation thereto."

At page 469 of 149 U. S., Judge Brewer, continuing, says:

> "It (St. Louis) is given power to open and establish streets, to improve them as it sees fit, and to *regulate* their use, paying for all this out of its own funds. The word '*regulate*' is one of broad import. It is the word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this Court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by Ordinance No. 11,604, it simply *regulates the use* when it prescribes the terms and conditions upon which they shall be used. If it should see fit to construct an expensive boulevard in the city, and then limit the use to vehicles of a certain kind, or exact a toll from all who use it, would that be other than a regulation of its use? And so it is only a matter of regulation of use, when the city grants to the telegraph company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been to in opening and improving the street."

As before noted, one of the latest grants of power over the streets to the city of Baltimore, is the right to regulate the use of the streets * * * by telegraph, telephone, electric light or other poles. (Act of 1890, chapter 370.)

The defendant in error having followed implicitly the law as laid down in this St. Louis vs. W. U. Tel. Co. Case, *supra*, as must appear from the ordinance itself, it is respectfully submitted, that even if the Court should be of the opinion that it has jurisdiction, then it must affirm the judgment of the Court of Appeals of Maryland, for the reason as was said in a recent case by Mr. *Chief Justice Fuller*, speaking for the Court:

> "We agree with counsel that this Court has jurisdiction, but are of opinion, that the principles to be applied in its exercise, are so well settled, that further argument is not needed, and that this being so, the jurisdiction may be said, under the circumstances, to rest on so narrow a foundation as to give color to the motion to dismiss, and justify the disposal of the case on the motion to affirm."
>
> N. Y. & N. E. R. Co. vs. Bristol, 151 U. S. 566.

The defendant in error therefore asks the Court to dismiss this writ of error, for want of jurisdiction in this Court; but if the Court concludes that it has jurisdiction, then, in the language of the motion and rule 6, of this Court, "*because it is manifest that the appeal is frivolous and merely taken for delay*," it is asked that the judgment be affirmed.

THOMAS G. HAYES, *City Counselor for Baltimore*,
VM. S. BRYAN, JR., *City Solicitor for Baltimore*,
Counsel for Defendant in Error

APPENDIX.

"EXHIBIT A."

Ordinance No. 86 of 1893.

An Ordinance to provide for the *regulation of the use* of the streets, lanes and alleys of the city by telegraph, telephone, electric light and other poles, *and to fix the charge for the same.*

Section 1. Be it enacted and ordained by the Mayor and City Council of Baltimore, That all persons and corporations having, *using or maintaining any telegraph, telephone, electric light or other poles in any of the streets, lanes or alleys of the city of Baltimore*, shall, annually, between the fifteenth day of May and the first day of June, in each and every year, file with the City Commissioner a list of all such poles so used, possessed or maintained by them, giving the accurate locations of each of such poles, and shall also have stamped, painted or printed in legible characters, their name as owner, upon each of such poles

Sec. 2. And be it further enacted and ordained, That annually, between the first day of June and the fifteenth day of June, all persons and corporations shall pay to the City Comptroller a *fee of two dollars for each and every telegraph, telephone, electric light or other pole used, possessed or maintained by them in any of the streets, lanes or alleys of the city of Baltimore*, except trolley poles used exclusively for stringing thereon wires for use in the propulsion by electricity of street passenger cars; upon receiving the above *fee*, the Comptroller shall deliver to the person or corporation paying the same a tin plate, with a plain and conspicuous number thereon, to be provided in the manner prescribed in the next succeeding section, for each and every pole upon which the said license fee is paid, and shall also enter into a book, to be kept for that purpose, the name of the person or corporation to whom the license is issued, and the number of poles for which it is issued, and the number of the tin plates delivered to the person paying such license fee; he shall also deliver to such person or corporation a certificate, under his own hand and the seal of the city, that such person or corporation has paid the required license fee for that year on the specified number of poles, and has received the tin plates of the given numbers therefor; such person or corporation shall then have one of such tin plates securely fastened in some conspicuous place upon each of the poles used, possessed or maintained by it or him.

Sec. 3. And be it further enacted and ordained, That it shall be the duty of the City Comptroller, annually, on or before the fifteenth day of May in each and every year, to purchase a sufficient number of tin plates, numbered with plain, conspicuous figures, beginning with number one and so on progressively, to be furnished as prescribed in the preceding section of this ordinance, to the persons or corporations *using, possessing or maintaining telegraph, telephone, electric light or other poles,* other than trolley poles used exclusively for stringing wires thereon for use in the propulsion by electricity of street passenger cars; the Comptroller shall cause to be stamped on each of such tin plates, with a proper die, the year in which they are issued; the said plates to be of suitable size and description in the discretion of the Comptroller, and to be paid for out of the appropriation for general licenses.

Sec. 4. And be it further enacted and ordained, That all telegraph, telephone, electric light and other poles in any of the streets, lanes and alleys of the city of Baltimore, except trolley poles used exclusively for stringing thereon wires for use in the propulsion of street passenger cars, which have not been included in any list filed in accordance with the first section of this ordinance with the City Commissioner, or upon which the name of the owner is not legibly painted, printed or stamped, or upon which the above mentioned license fee has not been paid, or on which the above prescribed tin plate is not securely fastened in some conspicuous place, on or before the fifteenth day of June, in any year, shall be forthwith removed by its owner, and in default thereof, may be cut or taken down by the City Commissioner and removed from the streets by him, in addition to the said owner incurring the penalties provided in the next succeeding section of this ordinance.

Sec. 5. And be it further enacted and ordained, *That any person, persons or corporation, using, possessing or maintaining any telegraph, telephone, electric light or other poles in any of the streets, lanes and alleys of the city of Baltimore*, who shall fail to file with the City Commissioner, as prescribed in the first section of this ordinance, a list of said poles, or who shall fail to have stamped, painted or printed in legible characters, his or its name, as owner, upon each of such poles, as prescribed in said first section of this ordinance, by the fifteenth day of June of each and every year, or who, if belonging to the classes required to pay a *fee* of two dollars on each pole, by the second section of this ordinance, shall fail to pay the said *fee*, or shall fail to have the tin plate therein prescribed securely fastened in some conspicuous place by the said fifteenth day of June of each and every year, upon all such telegraph, telephone, electric light or other poles, so used, possessed or maintained by him or them, shall forfeit and pay a fine of ten dollars for each pole upon which he, they or it, are so in default; such fines to be collected as other fines and penalties for violation of city ordinances are collected.

Sec. 6. And be it further enacted and ordained, That this ordinance shall take effect from the date of its passage.

EXHIBIT B.

Postal Telegraph Company *vs.* Mayor and City Council of Baltimore,	in the Court of Appeals of Maryland. —— *April Term, 1894.*

Bryan, J., delivered the opinion of the Court.

On the twentieth day of April, 1893, the Mayor and City Council of Baltimore passed an ordinance which imposed a tax of two dollars on each telegraph, telephone, electric light or other pole, which should be used in any of the streets, lanes or alleys of the city,—but the ordinance excepted trolley poles, which were used exclusively for stringing thereon wires for use in the propulsion of street passenger cars by electricity.

The Postal Telegraph Cable Company used and maintained five hundred and nine telegraph polls in the public streets of Baltimore, but refused to pay the tax on them. A suit was brought by the Mayor and City Council to recover the amount due according to the terms of the ordinance. That telegraph company, instead of pleading to the declaration, filed an answer, composed of twenty-five sections. The plaintiff demurred, and by consent of counsel, a pro forma judgment was entered, sustaining the demurrer and determining that the plaintiff should recover the amount of the tax.

The answer filed by the defendant seems to be framed on the model of equity proceedings. Both in form and substance, it is in absolute disregard of the practice prevailing in this State, and was necessarily held bad on demurrer. But as the object of this suit is to determine the validity of the ordinance in question, we shall express our opinion upon it without regard to errors in practice and procedure. We shall assume (as is undoubtedly the case,) that the defendant is a corporation under the laws of New York; and that it is engaged in operating telegraph lines over the postroads of several States of the Union, by making telegraphic communications for commercial and other purposes; and that it has accepted the provisions of the Act of Congress of July 1866, (title 65 of U. S. Revised Statutes) relating to the occupancy of postroads; and that it is entitled to the privileges conferred by that Act. It has been decided by the Supreme Court of the United States that telegraphic communication between the different States is a species of interstate commerce, and that it is, therefore, within the control of Congress. The telegraph companies which have accepted the provisions of the Act of 1866 are entitled to use the postroads of the United States for the operation of their lines.

The streets of the city of Baltimore are postroads, and in this capacity are subject to this Act of Congress.

But it cannot be supposed that any power is conferred upon a telegraph company to use the streets without compensation.

The Supreme Court has decided what the right to use a post-road means. It has said that this Act "gives no foreign corporation the right to enter upon private property without the consent of the owner, and erect the necessary structures for its business; but it does provide, that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges" * * * "These (meaning postroads) are within the dominion of the National Government to the extent of the national powers, and are, therefore, subject to legitimate congressional regulation. No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

Pensacola Telegraph Company vs. Western Union Telegraph Company, 96 United States, page 1.

It is not contended upon the part of the plaintiff that any State authority can prevent or hinder interstate commerce, or that it can tax the receipts derived from it, or that it can require a license for carrying on the business, or the payment of a sum of money for such license.

The city ordinance does not exclude the telegraph company from the use of the streets as postroads; on the contrary it recognizes such use and exacts compensation therefor. The question arises whether such compensation can be lawfully demanded.

The power of the Mayor and City Council of Baltimore over the streets cannot be regarded as within the region of debate.

By legislative enactment, by long continued usage, and by repeated decisions of our Courts, it has been determined that it has full and complete control over the streets and highways of the city. The Act of 1890, chapter 370, declared that it should have power to regulate the use of the streets by telegraph, telephone, electric light and other wires and poles; and that it might require the wires to be placed under ground. It may permit the erection of poles, determine where they may be placed, and upon what terms they may be used. The erection of a pole is the appropriation of a portion of a street, and the entire exclusion of the public from the use of it. It is necessarily to some extent an obstruction, and under some circumstances, it may be a great public inconvenience.

The telegraph company has not the semblance of a right to appropriate any portion of the streets in this way.

It may be suggested that it might acquire such right by condemnation. We shall not discuss this question.

The assertion of such a pretension would be regarded as offensive in the highest degree, and would call forth great opposition. If the question should ever be presented to the Courts, we trust that it may be temperately and dispassionately discussed, and wisely and justly decided.

As the matter now stands, the consent of the Mayor and City Council must be obtained for the use of the poles.

It would not be right to clog the consent with unjust and unreasonable conditions, such as would manifest a purpose to prevent the transaction of the interstate business of the telegraph company, or to impede, oppress and embarrass it, or to make a discrimination against it in favor of some rival company. The privilege of using the poles is granted on the payment of the sum of two dollars per annum for each pole. This is less than seventeen cents a month. Baltimore is a large and populous city. In the localities desirable for telegraph offices the sidewalks are frequently thronged by large numbers of people, and the driveways so closely blocked with vehicles, that it is a matter of peril and difficulty to cross from one side of the street to the other In many other parts of the city the crowding of the streets is sometimes very great. It is a matter of much importance to preserve space for public convenience. If we take as a standard the rental value of ground fronting on public streets, we will see that seventeen cents a month for the space covered by a telegraph pole is a very small fraction of the value of its occupation; and it is a vastly smaller fraction of the compensation due for the inconvenience caused to occupiers of houses in the vicinity, and to persons using the streets in the ordinary methods of travel.

The Mayor and City Council, however, with a wise and liberal forecast, have forborne to place burdens on industries and enterprises, which accompany and increase the growth and prosperity of the city. In our opinion, the tax on these poles is reasonable and moderate. We, of course, are conclusively bound by the decision of the Supreme Court, in St. Louis vs. Western Union Telegraph Company, 148 United States, 92.

In that case, the validity of a tax was in question, which had been imposed by the city of St. Louis on telegraph poles of the Western Union Company. The Court overruled the suggestion, that the Act of Congress, which granted the use of the post-roads, conferred on telegraph companies the unrestricted right to appropriate public or private property; and affirmed that the franchise or privilege was to be exercised in subordination to public and private rights. It held that the tax was valid; and said in speaking of the public streets: "While for purposes of travel and common use, they are open to the citizens of every State alike, and no State can by its legislation, deprive the citizens of another State of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another State, or a corporation of the national government, it is within the competency of the State, representing the sovereignty of that local public, to exact, for its benefit, compensation for this exclusive appropriation.

"It matters not for what that exclusive appropriation is taken, whether for steam railroads, telegraphs or telephones, the State may, if it chooses, exact from the party or corporation given such exclusive use, pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated." The tax was five dollars per annum for each pole, and it was maintained by the telegraph company, that it was unreasonable, unjust and excessive. As the judgment in favor of the telegraph company was reversed on other grounds, the

Court said that the question might be passed for further investigation on the new trial. It also said "*prima facie*, an ordinance like that is reasonable. The Court cannot assume that such a charge is excessive, and so excessive as to make the ordinance unreasonable and void; for, as applied in certain cases, a like charge for so much appropriation of the streets may be reasonable." On a motion for reargument, the Court reaffirms the validity of the tax.

In speaking of the power to regulate the use of the streets, which was vested in the city of St. Louis under its charter, it said:

"If it should see fit to construct an expensive boulevard in the city, and then limit the use to vehicles of a certain kind, or exact a toll from all who use it, would that be other than a regulation of the use? And so it is only a matter of regulation of use, when the city grants to the telegraph company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been to, in opening and improving the street. Unless, therefore, the telegraph company has some superior right which excludes it from subjection to this control on the part of the city over the streets, it would seem that the power to require payment of some reasonable sum, for the exclusive use of a portion of the streets, was within the grant of power to regulate the use. That the company gets no such right from the general government is shown by the opinion heretofore delivered, nor has it any such from the State."

The judgment below must be affirmed.

Judgment affirmed.

THE POSTAL TELEGRAPH CABLE COMPANY, *Plaintiff in Error,* *vs.* MAYOR AND CITY COUNCIL OF BALTIMORE, *Defendant in Error.*	IN THE SUPREME COURT OF THE UNITED STATES. Term No. 828. *October Term, 1894.*

To GEORGE H. BATES, ESQ.,
Attorney for Plaintiff in Error.

We herewith hand you copies of motion to dismiss and affirm in the above entitled case, together with copies of brief in support thereof, and Exhibits attached to said brief, and notify you that the same will be filed in the Supreme Court of the United States on Monday the 3d day of December, 1894.

Very respectfully, yours,

THOMAS G. HAYES,
City Counselor for Baltimore,
WILLIAM S. BRYAN, JR.,
City Solicitor for Baltimore,
Attorneys for Defendant in Error.

Service of the copy of the above motion to dismiss and affirm, and of the brief and Exhibits therein mentioned, and the date of filing the same, admitted this 7th day of November, 1894.

GEORGE H. BATES,
Attorney for Plaintiff in Error.

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156-210

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT of the UNITED STATES.

156-210

Term No. 828. *October Term, 1894.*

In Error to the Court of Appeals of State of Maryland.

THE POSTAL TELEGRAPH CABLE COMPANY,

Plaintiff in Error.

vs.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR ON MOTIONS TO DISMISS AND AFFIRM.

GEO. H. BATES,
Of Counsel for Plaintiff in Error.

IN THE

SUPREME COURT of the UNITED STATES.

Term No. 828. *October Term, 1894.*

In Error to the Court of Appeals of State of Maryland.

THE POSTAL TELEGRAPH CABLE COMPANY

Plaintiff in Error.

vs.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR ON MOTIONS TO DISMISS AND AFFIRM.

STATEMENT OF THE CASE.

This was an action by the City of Baltimore against the Postal Telegraph-Cable Company instituted November 11, A. D. 1893, in the Court of Common Pleas of Baltimore City, for One thousand and eighteen dollars, with interest, alleged to be due under ordinance No. 86 of 1893, passed April 20th, A. D. 1893, for license fees for five hundred and nine telegraph poles used and maintained by the Telegraph Company in the streets, lanes or alleys of the

State, as required by law, and which have been assessed thereon during the period mentioned in the complaint.

(*b*) The lines and property of said plaintiff-in-error and all other telegraph companies, are subject to local taxation according to their value, under and by virtue of the statute laws of said State of Maryland, and are not subject to any other taxation for any purposes than that annually upon its capital stock and upon its gross receipts ; that said city of Baltimore, under the Constitution of the State of Maryland, and the statutes made in pursuance thereof, must raise and obtain all its revenues by taxation, which must be *ad valorem* upon the property within the city limits of said Baltimore, and is not authorized or empowered to substitute specific taxation upon property in place of *ad valorem* taxation or in addition thereto.

(*c*) That said City Council of Baltimore has no power to levy or assess taxes upon property ; and that said tax is not in manner or form levied or assessed according to law, and was not assessed or established by due course of law, and is not in same manner and form as is assessed upon other real and personal property belonging to individuals. That said Baltimore ordinance in the complaint mentioned, is in part for the purpose of deriving revenue for general purposes for the support and maintenance of the State, City and County government of Baltimore, and to be appropriated to the same purpose as the general revenues of the city are appropriated. That said ordinance in effect prescribes and lays a specific tax upon defendant, (plaintiff-in-error), and the articles therein mentioned as a means of general revenue. That all taxes and revenues obtained by the City of Baltimore by taxation include a proportion of the County and State tax, in which said city is located, and are proportionately appropriated thereto.

That the county of Baltimore comprises the city of Baltimore, and has a large population and much valuable property that is subject to taxation and expense apart from the city of Baltimore, and alleges that property located there is only subjected to an *ad valorem* tax for county purposes.

(*d*) That the license fees and specific charges upon telephone and telegraph poles and wires and upon electric light poles and posts, and conductors claimed by said ordinances would amount to about fifty thousand dollars per year during the year aforesaid, and that said sums so assessed by said ordinances are largely in excess of any reasonable fee for the license and care of said city, for the regulation of said poles and wires and the labor attending the supervision and regulation of the same by the city authorities, the amount of said tax being at least ten times the cost of attending to the supervision and regulation of said kind of property by the city authorities.

(*e*) That said license charge is equal to about twenty per cent. of the value of the property upon which it is imposed and is at a much greater rate of taxation than is imposed upon other property and money capital in the hands of individuals or employed or invested in commercial business within said city and State of Maryland, and is, in addition to taxes, assessed and taxed *ad valorem* upon its said property. That said taxes and charges are unequally imposed. That many of the posts and poles, and the wires used for electrical purposes in the city of Baltimore, are of much more value than those of the defendant, and require much more care and attention from the said city authorities than do those of defendant.

(*f*) That the penalty for the non-payment of said license charge prescribed by said ordinance is at a greater rate and amount than is prescribed by law for the non-payment of taxes upon real and personal property and is oppressive and unreasonable.

3. The defendant further alleges that said ordinance, in effect and in fact, injuriously discriminates against the defendant and prevents fair and equal competition by defendant in the telegraph business. That said defendant, in the enforcement and effect of said ordinance, is denied the equal protection of the laws in regard to its business and property that should be accorded to it, and which it is legally entitled to and which similar property and business obtains by the terms and effect of said ordinance, and said tax is not of uniform operation.

4. That the tax imposed by said ordinance is unreasonable.

(*a*) That the class of property to which said ordinance is expressly made to apply is of various sizes, nature, materials and conditions, and of unequal values. That the telegraph poles used by plaintiff-in-error, as aforesaid, are from thirty-five feet to sixty feet high, none of them exceed the latter height. There are 280 poles with three cross-arms, carrying ten wires; 229 poles with two cross-arms, carrying ten wires. The cross-arms are six feet long, carrying four wires each, and some of them are eight feet long, carrying six wires.

That the telegraph poles used by plaintiff-in-error, as aforesaid, carry from ten to thirteen wires each, none of them carrying more than thirteen wires. That telegraph poles used by other telegraph, telephone and railroad companies in said city are many of them ninety feet high; some of them carrying 25 cross-arms six feet or more long, carrying six or more wires each, and some cross-arms ten feet long, carrying eight wires each. The total number of wires carried on said highest poles are from one hundred and twenty to one hundred and fifty-two wires that are supported by each telegraph pole. That many of the telegraph poles owned and used by other telegraph companies also carry electric light conductors and telephone wires, and thus the said license charge is equally divided and thus borne by the three corporations that jointly use one pole. That many of the telegraph, telephone and electric ight companies rent out to each other the use of said poles for the purpose of carrying electrical conductors for the purposes aforesaid, for an annual rental for each wire or conductor so carried, and the said license charge for each pole is thus paid for in part by such rental, and is not wholly borne by the owner of said pole. That a large number of telegraph poles in use in said city by other telegraph and telephone companies and others, are upon the right of way or alongside the various railroad companies that run into and across said city, and that said ordinance and license charge is not made to apply to them, and cannot be legally made to apply to poles thus used for electrical conductors for telegraph purposes, and for the purpose of power or the propulsion of street cars, commonly called a "trolley railroad."

(*b*) That the city owns or is interested in the ownership of a large number of the poles used for telegraph, telephone, electric light and power purposes, which it rents out to private corporations for said uses, at an annual rent for each said pole for revenue, and that said rental *is* much less than the said license charge upon the like poles of the defendant and poles of other telegraph and telephone companies.

In order to expedite the progress of the cause to the state court of last resort by agreement of counsel, judgment for the plaintiff was entered *pro forma* in the Court of Common Pleas, and a writ of error was taken which was argued in the Court of Appeals at the next term. That court affirmed the judgment and a writ of error was then taken to this court.

On November 21, 1893, the case was, by due proceedings instituted at the proper time as required by the Statute, removed to the Circuit Court of the United States for the District of Maryland, and the plea or answer so much referred to was filed in that Court. On January 31, 1894, a motion to remand the case was filed by the plaintiff below on the ground that the amount in dispute was less than two thousand dollars, and therefore the Circuit Court had no jurisdiction. On February 27, 1894, after full argument, an order was made granting the motion and directing the cause to be remanded to the Court of Common Pleas of Baltimore City, where the case was proceeded with as before stated.

SPECIFICATIONS OF THE ERRORS RELIED UPON.

FIRST. That the judgment of the Court of Common Pleas of Baltimore City should not have been affirmed, but on the contrary, the said judgment should have been reversed by the Court of Appeals.

SECOND. That the ordinance of the City of Baltimore, No. 86 of 1893, under which the defendant-in-error seeks to recover, is unreasonable, oppressive and unjust, and consequently void.

THIRD. That the said ordinance is in conflict with paragraph 3, Sec. 8, Article I of the Constitution of the United States and is therefore void.

FOURTH. That the said ordinance is in conflict with paragraph 7, Sec. 8, Article I, of the Constitution of the United States and is therefore void.

FIFTH. That the said ordinance is in conflict with the Fourteenth Amendment of the Constitution of the United States, and is therefore void.

SIXTH. That the said ordinance is in conflict with the rights acquired by defendant under the Act of Congress of July 24th, 1866, and is therefore void.

SEVENTH. That the said ordinance is in conflict with Article 15 of the Bill of Rights of the State of Maryland and is therefore void.

EIGHTH. That the said ordinance is in conflict with Article 27 of the Bill of Rights of the State of Maryland, and is therefore void.

NINTH. That the said ordinance is in conflict with Article 4 of the Bill of Rights of the State of Maryland, and is therefore void.

TENTH. That the said ordinance provides for a tax or license on telegraph poles and not for a rental of the space occupied by said poles.

ELEVENTH. That the City Council of Baltimore had no authority or power by express statute or necessary implication to enact said ordinance or create the claims upon which this judgment is founded.

TWELFTH. That this case was properly removable to the United States Circuit Court and ought not to have been remanded by that Court to the Court of Common Pleas of Baltimore City.

ARGUMENT.

THE MOTION TO DISMISS.

THERE WAS A FEDERAL QUESTION.

The motion to dismiss, as appears from the brief of the defendant-in-error, is based solely upon the position that the decision below rested entirely upon the question of pleading and that nothing was in fact decided except that the plea was bad on demurrer. To quote the language of the brief:

> "The Court of Appeals of Maryland bases its decision in this case, affirming the judgment below, wholly on the defective pleading of the plaintiff-in-error. The Federal question was not involved in its decision except incidentally. It was not necessary for the State Court's decision." And again, "The Court then proceeds to give its opinion sustaining the constitutionality of the ordinance in question. Its decision, however, entirely independent of the ordinance, was based on the sustaining of the demurrer to the plaintiff-in-error's defective plea."

It is not controverted, nor would it be necessary to do so in this case that to give jurisdiction here there must not only be involved a Federal question but that it must either have been raised and decided in the State Court, or that its decision was necessary to the judgment or decree rendered in the case. It is better perhaps to recur to the language in which this Court stated the rule after an elaborate consideration of its jurisdiction in this class of cases.

Of the seven propositions laid down in Murdock vs. Memphis 20 Wall. 590, 635, the two containing the rule in question were:

> 1. "That it is essential to the jurisdiction of this court over the judgment of a State Court, that it shall appear that one of the questions mentioned in the act must have been raised, and presented to the State Court."
>
> 2. "That it must have been decided by the State Court, or that its decision was necessary to the judgment or decree, rendered in the case."

In the most recent cases this language has been strictly adhered to and the case of Murdock vs. Memphis is generally referred to as establishing the rule.

Choteau vs. Gibson, 111 U. S. 200.
Detroit Railway Co. vs. Guthard, 114 U. S. 133.
Cook Co. vs. Calumet & Chicago Canal Co. 138 U. S. 635.

If the Federal question is necessarily involved in the case, it is not necessary that it should appear affirmatively in the record, or in the opinion of the Court, that such question was raised or decided.

Kankauna Co. vs. Green Bay & Canal, 142 U. S. 254.
Roby vs. Colehour, 146 U. S. 153.

In the present case, it is submitted, there can be no doubt that a Federal question was raised and presented to the State Court the decision of which was necessary to the judgment rendered in the case, and that this question was, in fact, decided by the State Court.

THE EFFECT OF THE DEMURRER.

It was claimed in defence to the action that the ordinance under which a recovery was sought, was invalid among other reasons because it was in violation of the Constitution of the United States and the laws enacted by Congress in the execution of its constitutional power and authority. If this position was well taken the declaration was bad, and, if demurred, to judgment must have been for the defendant in the action. It is an elementary principle of the law of Pleading that a demurrer at any stage of the pleadings reaches back through the whole record.

Stephen on Pleading, 144.
Gould's Pleadings, Ch. IX. Sec. 36.

This principle that on demurrer all pleadings are open to review and judgment must be given against the party, whose pleading is first defective, has been repeated again and again by the Maryland Court of Appeals.

In Scott vs. State, 2 Md. 284, the court citing Sasscer vs. Walker, 5 G. & J. 102, says :—

"In that case like the present there was a demurrer to the replication, Buchanan C. J. commences his opinion by the inquiry, which is equally applicable to this case, '*Which, then, committed the first fault in pleading*, is an inquiry thrown upon us by the demurrer.' If the declaration had been defective, as is here contended it was, it is hardly to be supposed that the defect would have escaped the vigorous eye of the Chief Justice, especially as he started out with the avowed purpose of searching for defects if any existed."

It is a well established rule that courts of law will give judgment against the party whose pleading is first bad.

Lloyd vs. Burgess, 4 Gill, 187.
Warfield vs. Brewer, Ib. 265.

Upon a general demurrer, which brings before the court the whole record, judgment will be rendered against the pleading which contains the first vice or imperfection.

Baugher vs. Nelson, 9 Gill, 299.

A demurrer mounts up to the first error in pleading and requires the court to give judgment accordingly.

Dilley et al. vs. Roman et al, 17 Md. 337.
State vs. Culler, 18 Md. 418.
Washington and Baltimore Turnpike Co. vs. State, 19 Md. 239.

It is a necessary consequence of this rule that to give judgment upon a general demurrer to any pleading in the case requires the Court to pass upon the sufficiency of every pleading from the declaration down. Where judgment is given upon a subsequent pleading, it is a conclusion of law that the Court examine and pass upon every point necessarily involved in the question, whether the declaration present a good cause of action. In other words, a general demurrer to any pleading puts in issue before the court the sufficiency of every pleading in the case all of which must be passed upon in turn before a decision can be made, whether any pleading is defective, and if so ruled, the first vice is located. Every pleading, therefore, is as much open to review as the one demurred to.

"By the demurrer, all the pleadings are open for review; and it is an established principle in pleading, both civil and criminal, that on a demurrer, the Court gives judgment against the party whose pleading was first defective, notwithstanding the defect of the pleading referred to."

Spielman vs. State, 27 Md. 520.

"Nor is it like the case of a demurrer, which is a direct attack upon the pleadings themselves, wherein the Court *must of necessity inspect all the pleadings* in the case, as well to enable it to ascertain the sufficiency of the particular pleading demurred to, as in giving its judgment thereon to mount up to the first material error in pleading."

Leopards vs. C. &. O. Canal Co., 1 Gill 222.

No authority ought to be required on this point and the citation of the principle is only prompted by the extraordinary position taken for the defendant-in-error as above quoted.

NO QUESTION OF PLEADING WAS CONSIDERED BELOW.

That it was quite well understood that the sufficiency of the declaration, and therein, the validity of the ordinance must be passed upon by the Court in deciding the demurrer, appears from the only reference to the question of pleading in the brief of the defendant-in-error, filed by the same counsel in the Court of Appeals:

"In discussing the case in this Court no time will be spent in considering the plea or answer. It will be assumed that it violated almost every rule of sound pleading; that it consisted largely of matter of argument; that if it presented any defence at all, it presented several distinct defences, and was, therefore, bad for duplicity; that it was also an inartificial attempt to plead a general denial, and was, therefore, bad as being tantamount to the general issue.

"But, assuming that that pleading was fatally defective, as the demurrer mounts up to the first error in pleading, judgment could not have been rightfully entered for the city unless the declaration disclosed a good cause of action."

The only reference to this subject in the brief of the plaintiff-in-error in the same Court, shows that the question of pleading was treated by both sides in the argument as of little consequence. That brief, written by the counsel then in control of the litigation, who prepared the plea or answer (as he terms it in accordance with the New York practice) says:

> "The plaintiff demurs to the answer by general demurrer, which goes to the sufficiency of the allegations of new matter in the answer, but does not apply to the form of the answer.
>
> Pomeroy's Remedies and Remedial Rights, Sec. 596.
>
> This demurrer admits that all the alleged facts in the answer are true (Stephen's Pleading, p. 140), but the conclusions of law stated in the answer are not to be regarded as true, but may operate as denials and may be considered in connection with the allegations of fact, and the actual law must be applied to the alleged facts.
>
> The answer is in such form and detail that its various distinct allegations may each be regarded as a distinct point, thus presenting many defences to the complaint, each to be considered in connection with the State and National constitutional provisions and the State and National laws, which the appellant will specifically point out in connection with judicial decisions to sustain appellant's grounds that said ordinances are void."

Respecting the wholesale criticism of the plea, above quoted from the brief of the defendant-in-error, below which is repeated in its brief here, it may be said that even if it had contained immaterial matter, the same Court has decided that if an immaterial fact be put in issue it is only surplusage and does not make a plea double.

Stewardson vs. White, 3 Harr and McH. 455.

And also that repugnant, inconsistent, idle or superfluous protestation does not vitiate a plea.

McLaughlin vs. DeYoung, 3 G. & J. 4.

It would have been considered unnecessary to discuss the question of pleading here both because the principles are well settled and also because of the decision of the Maryland Court, but for the fact that counsel responsible for the plea so fiercely assailed is not in the case in this Court to respond to these criticisms.

EFFECT OF THE JUDGMENT IN THE STATE COURT.

The Court of Appeals has decided the case in favor of the demurrer by a simple affirmance of the *pro forma* decision of the Court of Common Pleas.

The legal effect of that decision necessarily involves the conclusion that the Court after reviewing the whole record considered that the declaration contained a good cause of action. By giving judgment for the original plaintiff on the demurrer the Court necessarily decided that the ordinance was valid and thus determined the Federal question raised by the objection that it was in conflict with the Constitution and laws of the United States. No judgment for the demurrant could have been rendered without involving a decision of this question, although a contrary decision might have been based on other grounds set up by way of defence.

It appears from the opinion filed in the case that the Court of Appeals acted upon the view of the effect of the pleadings here expressed. It held the plea to be bad on demurrer, but naturally and properly passed at once to the consideration of the declaration recognizing that "the object of this suit is to determine the validity of the ordinance in question." The entire opinion is practically devoted to the Federal question involved, and the questions raised under the Constitution and Bill of Rights of Maryland and the legislation of that state respecting taxation and the City of Baltimore are ignored. There is, therefore, no ground for contending that the decision was in fact based on any state or local question. The motion to dismiss, therefore, rests entirely on the untenable ground now taken respecting the question of pleading.

It is also to be observed that the Maryland Court did not discuss this Federal question involved, except to consider itself bound by the decision of this Court in St. Louis vs. Western Union Telegraph Co., 148 U. S., 92. There was no consideration of the relative corporate powers of the two cities, nor examination of the facts to see whether they were substantially the same in the two cases? The relation of that decision to this case is open to the fullest consideration by this Court and will be hereafter discussed.

THE MOTION TO AFFIRM.

The ordinance provided for a tax and not a rental.

The original suit in the Court of Common Pleas of Baltimore was, as stated in the brief of the defendant-in-error for the sum of Two dollars per pole for five hundred and nine telegraph poles, owned by the plaintiff-in-error, and erected in the public streets of Baltimore. Under Section 2 of the Ordinance requiring such payment of Two dollars, that sum was made an annual charge upon "all persons and corporations" "for each and every telegraph, telephone, electric light or other pole used or maintained by them in any of the streets, lanes and alleys of the City of Baltimore, except trolley poles used exclusively for stringing thereon wires for use in the propulsion of electricity for their passenger cars."

Nothing in the Ordinance itself justifies the statement in the brief of the defendant-in-error that this charge was "an annual rental fee for the use of the streets of Baltimore." The Ordinance in Section 2 calls it "a fee," and directs the comptroller "upon receiving the above *fee*" to "deliver to the person or corporation paying the same,"—not a receipt for rent,—but a numbered tin plate "for each and every pole upon which said license fee is paid."

By Section 3, it is expressly directed that such tin plates are "to be paid for" not out of any funds of the City used for any purpose connected with the rental of real estate or other property belonging to the city, but "out of the appropriation for general licenses." And as if in order that there may be no ambiguity as to the precise meaning of the word "fee" to qualify which the counsel for the defendant in error have felt compelled to import the idea of a "rental fee," Section 2 of the Act characterizes it as the "said license fee" paid upon each and every pole, and requires the entry in a book kept for that purpose of "the name of the person or corporation to whom the license is issued, and the number of poles for which *it* is issued, and the number of tin plates delivered to the person paying such license fee."

The comptroller is also required to deliver to the owner of the poles making the payment, a certificate that he or it "has paid the required license fee for that year on the specified number of poles."

Section 4 authorizes the cutting down of all poles "upon which the above mentioned license fee has not been paid." In view of this reiterated definition by the Ordinance itself of the kind of "fee" intended to be charged upon telegraph, telephone and electric light poles, and the repeated characterization of the fee as a "license fee,"—of the right bought thereby as a license,—and of the person paying the charge as a person to whom a license is issued, and the direction to charge the expense to the appropriation for general licenses, it is submitted that the Ordinance itself thus disposes of the contention of the defendant-in-error that

> "the sole object and purpose of the ordinance, as appears from its provisions, were to charge the companies named a rental for the use of the public streets of Baltimore by their poles, and the charge is in no sense a tax or business license or license charge for supervising the poles."

The earnestness with which this contention is urged indicates clearly the necessity felt for transforming the "license fee" of the Ordinance into the "rental fee" of the brief, and for maintaining that, it is not as was contended by the plaintiff-in-error "a tax or license on its business, or a license charged for supervising the poles."

CONSTRUCTION BY THE STATE COURT.

Taking issue with the brief of the defendant-in-error, it is submitted that the Ordinance itself, as already shown, does sustain our contention; and that the construction of the Ordinance by the Court of Appeals of Maryland is consistent with this view. The Court refers to it as "an Ordinance which imposed a tax of Two Dollars on each telegraph, telephone, electric light or other pole, which should be used in any of the streets, lanes or alleys of the city." It further states that the plaintiff-in-error "refused to pay the tax on" its five hundred and nine poles; this tax is characterized as compensation for "the use of the streets as post roads."

The Maryland Statute is said to confer upon the city the "power to regulate the use of the streets for telegraph, telephone, electric light and other wires and poles;" the municipal authority derived from the compliance with the provisions of the Ordinance is termed "the consent of the Mayor and City Council * * * * * for the use of the poles," the right purchased by the payment of the sum of two dollars per annum for each pole is termed "the privilege of using the poles."

The whole burden of the opinion on this subject is that the charge is justified as a compensation for the inconvenience to the public in the municipality, resulting from the obstruction of the highway by the poles erected thereon, and the justification of the charge, attempted to be made by the Court, is that it is necessary, in order to prevent such obstruction to an excessive degree. Thus if it violated no right to the use of the streets accruing to the plaintiff-in-error, under the Constitution and Laws of the United States it might undoubtedly be properly construed,—to use the language of the title of the Ordinance,—a "regulation of the use of the streets, lanes and alleys of the city by telegraph, telephone and electric light and other poles." There is not a word in the opinion of the Court of Appeals sustaining the construction of the Ordinance contended for, that it contemplates a rental of a portion of a highway. The word "rental" only occurs once in the opinion and that is where the "rental value of the ground fronting on public streets" is referred to, by way of illustration, to sustain the argument that two dollars per annum is not an unreasonable charge, not for the rental of a portion of the street, but for the "privilege of using the poles" and the prevention of too great encroachment upon the streets by pole-using companies.

Even in expressing the opinion that the charge is reasonable, the Court of Appeals again refers to it as "the tax on these poles," and immediately follows the declaration that the *tax* is reasonable by the remark:—"We, of course, are conclusively bound by the decision of the Supreme Court, in St. Louis vs. Western Union Telegraph Co. 148 U. S. 92." Continuing the court says, "In that case, the validity of a *tax* was in question, which had been imposed by the city of St. Louis on telegraph poles of the Western Union Company." Referring to the

St. Louis case Judge Bryan says:—"It (this court) held that the *tax* was valid," and again that "the *tax* (in St. Louis) was five dollars per annum for each pole" and "on a motion for re-argument the court re-affirms the validity of the tax." It is evident that the court totally misconceived the St. Louis case upon which it avowedly bases its opinion, apparently assuming that it covered this whole case. And the grave questions arising under the Maryland Constitution and laws were passed without even the scant courtesy of a reference or the slightest recognition that they had been raised and argued with special reference to the decisions of that court respecting the municipal power of taxation.

Thus the opinion from beginning to end treats the charge as a *tax*, mentions it in no single instance by any other name. If then the ordinance is construed by the Court of Appeals with respect to the charge of two dollars per pole, it fixes upon it throughout the character and designation of a tax. It is contended by the defendant-in-error that the construction of the ordinance by the Court of Appeals is conclusive upon this court. If that be so this court must treat the charge as that court has made it, a tax. They have appealed to Cæsar and by Cæsar let them be judged. So clear does it seem that this is the construction put upon the ordinance by the Court of Appeals, that we might be quite willing to have this court bound by it if such were the law.

Extent to which construction of State Court is conclusive.

The proposition, is urged however, that this court is bound by "the conclusion of the State Court as to the proper construction of the statutes of a State or *the ordinances of a municipality*." The words in italics are an addition, not only without any authority in the cases cited but contrary to the express adjudication of this court. Within certain limits this court does accept the conclusion of the State Court as to the proper construction of a *statute* of the State. Those limits are fairly indicated by the cases cited. Such conclusive effect may well be given to the construction of the State Court of its statute of limitations as in Green *vs.* Neal, 9 Pet. 291, and Davie *vs.* Briggs, 97 U. S. 628, the territorial limits within which or the class of business upon which the statute is intended to operate, as in L. N. O. & T. Railway Co. *vs.* Mississippi 133. U. S. 590, or whether a statute for condemning land did or did not require notice to the owner as in Balto. Traction Co. *vs.* Balto. Belt R. R. Co. 151 U. S. 137. But in the Mississippi case the court quotes largely from Hall *vs.* DeCuir, 95 U. S. 485, in which, while accepting the construction of the State Court that the Louisiana statute was to be treated as operating only on "persons travelling within that State," this Court held that the statute was void as imposing a direct burden on interstate commerce and interfering with its freedom and therefore encroaching on the exclusive power of Congress.

If, therefore, the State Court places a construction upon a statute of the class just referred to, with respect, for example, to its field of operation, whether upon interstate or *infra*state commerce, this Court would accept such construction and determine as in the Louisiana case whether though intended to act within the State, the effect of its operation there was to interfere with a subject exclusively under Federal regulation. So in this case, if the State Court decides that the charging of two dollars is a tax, this Court must in view of its long line of decisions on that subject hold such tax on interstate commerce invalid. Or if the State Court should declare that the tax was not a burden upon interstate commerce, this Court would declare that to be, not a construction of the ordinance, but an opinion of the State Court upon its effect, and with respect to such a question an encroachment upon the functions of this tribunal to decide whether there was an infringement of rights secured by Federal law.

But the rule of this Court, invoked by the defendant-in-error, does not apply to municipal ordinances. On the contrary, where the question was whether by reason of such an ordinance a petitioner for a writ of *habeas corpus* was denied a Federal right, the court said, "for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and judge." The court accordingly proceeded to put upon the ordinances "an independent construction," the result of which was thus expressed: "We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question."

Yick Wo *vs.* Hopkins, 118 U. S., 356, 366.

In that case the "erroneous view of the ordinances in question" taken by the California Court was pointed out in detail, and its judgment, based on its discarded construction of a municipal ordinance, was reversed.

It is submitted that what is characterized in the brief of the defendant-in-error as the "mistaken contention of the plaintiff-in-error" that the charge provided for by the ordinance, "is a *tax* or license on its business or license charged for supervising the poles" is substantially the only construction warranted by the terms of the Ordinance or indeed by the language of the Court of Appeals, and that the idea of converting it into a rental to be paid for the use of the space actually occupied in the streets is an after-thought, not only not warranted by the Ordinance but actually negatived by almost every section of it. It would seem that the plaintiff-in-error was not alone in the "mistaken" construction of the Ordinance, which treated it as imposing a *tax*, since the last allegation of the declaration filed by the counsel, whose brief is above quoted is as follows :

> "That the defendant has never paid to the City Comptroller the tax of two dollars per pole, by said ordinance imposed, or any part of it, but the same is still overdue and unpaid."

The stress which is laid upon this argument and the terms in which it is couched, necessarily lead to the conclusion that when it is found, as it must certainly be, untenable, it becomes a practical admission that the charge provided for in the Ordinance is a tax or license upon interstate commerce, and as such is, under the decisions of this Court, invalid. It is perhaps a fair inference from the

Ordinance and the brief of the defendant-in-error, that if the counsel for the city were now requested to draught an ordinance on this subject, it would not be couched in the terms employed in the one under consideration. It would probably contain very much of rental fee and no reference at all to license or license fee.

A strong argument in favor of the views here maintained, and against the theory of a rental, to be paid for so much space occupied by the poles, is to be found in the uniform charge of two dollars for each pole without regard to location or to the character of the street, lane or alley on which it is placed. If the framers of the Ordinance contemplated a rental, it would have been necessary for them to make provision in some way for the ascertainment of the relative value of the land occupied by each pole, and not to charge the same price for the occupation of portions, on the one hand, of the main street of a great city in its most crowded portions, and on the other hand, of streets far from the centre of business and but little traveled, or it may be of lanes or alleys used only for buildings of little value or for access to the back yards of dwelling houses. The defendant-in-error is thus confronted with a dilemma. If the charge is a tax or license, the Ordinance is invalid, and this as before stated, is practically admitted by its brief. If on the other hand by the charge of a rental, the Ordinance fails to make the necessary and proper provision for properly ascertaining and adjusting the value of the land rented, it is therefore unreasonable and void. And the question of the unreasonableness of the charge is admitted in its brief to be cognizable in this Court as involving a Federal question.

The ordinances in question are in conflict with Article I, Section 8, paragraph 3 and 7 of the Constitution of the United States; and the XIV amendment thereof, and the Act of Congress, approved the 24th of July, 1866, entitled: An Act to aid in the construction of the telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes (now Sec. 5263, et seq., R. S. U. S.), and consequently void.

The position of the plaintiff-in-error in this case entitles it to invoke the Constitution and Laws of the United States upon several and distinct grounds.

1. It is engaged in interstate commerce. The instruments of interstate commerce are as free from state control as are any of the instruments of the United States Government.

They are both placed in the control of the general government, by the constitution.

McCulloch vs. Maryland, 4 Wheat, 431.
Welton vs. Missouri, 91 U. S., 275.
Ward vs. Maryland, 12 Wal., 427.

2. It is a government agent for the transaction of government business under the authority of the laws of Congress.

3. It is upon the highways and post roads of the United States by authority of state law and law of Congress.

4. It is entitled to the equal protection of the laws of the land which is guaranteed to all by the XIVth Amendment and section 1977 of the laws of Congress, U. S. R. S.

These grounds will to some extent be considered together as the decisions of this Court on the general subject frequently touch the case at several points.

The provisions of the Constitution referred to other than the Fourteenth Amendment are those giving Congress power to regulate foreign and interstate commerce and to establish post-offices and post roads.

THE TELEGRAPH CO. MAY USE POST ROADS.

This license exaction is an abridgment of the rights, immunities and franchises of the Postal Telegraph Cable Co.'s charter in the free use of the post roads of the United States, and of the State of Maryland, under the laws thereof, in violation of the laws of Congress, and of the XIV Amendment of the United States Constitution and U. S. R. S. § 1977. Act of July 24, 1866.

By Section 1, of said Act any telegraph company organized under the laws of any state may construct, maintain and operate lines of telegraph through and over the public domain and the military and *post roads* of the United States, and over, under, or across its navigable streams and waters. Section 2, gives priority to Government messages at rates to be annually fixed by the Postmaster-General. Section 3, gives the Government an option to purchase after July 24th, 1871. And by the act a penalty is imposed upon such companies, should they fail to perform the services for the Government which they assume to perform by their acceptance of the provisions of the act.

By the act of March 1st, 1884 (23 Statutes at large, p. 3.)

> "All public roads and highways, while kept up and maintained as such, are hereby declared to be post roads.

And by Sec. 3964, Rev. Stat. U. S.-

> " The following are established post roads * * * * * All letter carrier routes established in any city or town for the collection and delivery of mail matters."

It is admitted that defendant has accepted the provisions of the Act of Congress of July 24th, 1866, and for many years has possessed, and now possesses, all the rights and privileges conferred by, and is subject to all the obligations and restrictions arising from such acceptance. Its right, therefore, to erect and maintain its lines of telegraph upon and along the streets of the city, has been directly conferred by Act of Congress. This Court has determined this privilege to have been rightfully given, and that, so far as a State or one of its divisions is concerned, such privilege is subject only to proper police regulations for its exercise. This Court has also decided that defendant is an instrument of interstate commerce, and that no State or municipality has the power to exact a tax as a condition of its right to do business, or to impose any tax or other burden which impedes or interferes with the fullest enjoyment of the rights and privileges expressly conferred upon it, or which, as a Government agent and instrument of interstate commerce, it enjoys.

This statute referred to has been construed by this Court in a number of important cases. In Pensacola Telegraph Company vs. Western Union Telegraph Company, 96 U. S., page 11, Chief Justice Waite, delivering the opinion of the court, says:

> "The Statute of July 24th, 1866, in effect amounts to the prohibition of all State monopolies in this particular: It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens, that the erection of telegraph lines shall, so far as a State interference is concerned, be free to all who submit to the condition imposed by Congress, and that corporations organized under the law of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the National Government for this national privilege."

In Telegraph Company vs. Texas—105 U. S. 460—Chief Justice Waite, again construing the statute, in his opinion, says:

> "Congress, to facilitate the erection of Telegraph lines, has by Statute authorized the use of the public domain and the military and post roads, and the crossing of navigable streams and waters of the United States for that purpose. As a return for the privilege those who avail themselves of it are bound to give the United

States precedence in the use of their lines for public business at rates to be fixed by the Postmaster-General. Thus, as to Government business, companies of this class become Government agencies. The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of a Government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of it occupation and its business."

In Western Union Telegraph Company vs. Pendelton—122 U. S. 358—the Court say:

"In these cases the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries, or among the States, is affirmed whenever that body chooses to exert its power, and it is also held that the State can impose no impediments to the freedom of that commerce. * * * * * * The Supreme Court of Indiana placed its decision in support of the statute principally upon the ground that it was the exercise of the police power of the State. Undoubtedly, under the reserved powers of the State, which are designated under that somewhat ambiguous term of police powers, regulations may be prescribed by the State for the good order, peace and protection of the community. The subjects upon which the State may act are almost infinite, yet in its regulations with respect to all of them there is this necessary limitation: that the State does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution. Within that limitation it may, undoubtedly, make all necessary provisions with respect to the buildings, poles and wires of telegraph companies in its jurisdiction, which the comfort and convenience of the community may require."

In W. U. Tel. Co. vs. Massachusetts, 125 U. S., p. 530-554. Mr. Justice Miller said in regard to the effect of §5263 of the U. S. R. S.:

"If the Congress of the U. S. had authority to say that the (telegraph) company might construct and operate its telegraph over these lines (on the U. S. post roads,) as we have repeatedly held it had, the State can have no authority to say it shall not be done."

And again:

"While the State could not interfere by any specific statute, to prevent a corporation from placing its lines along any of these post roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the

State for the protection of its property and its rights, is liable to be taxed upon its real or personal *property* as any other person would be."

THE ORDINANCE IS VOID BECAUSE IT IMPOSES AN ADDITIONAL BURDEN ON INTERSTATE COMMERCE.

It being well settled that telegraphic communication is commerce, it is contended that the case of Leloup vs. Mobile, 137 U. S. 640, correctly lays down the privileges which must govern this case, and that in view of the necessary construction to be given to the Baltimore Ordinance, the rule laid down in that case must be applied to it and conclusively determine its unconstitutionality.

There was a city ordinance of Mobile authorized by the State law of Alabama, altering and imposing a license charge upon every telegraph company, of $225 for the year, and imposing a fine upon the manager of every telegraph company for doing business without such license and payment of the fee specified therefor.

The manager of the Western Union Telegraph Company in Mobile declined to take out a license under said ordinance, and was taken before a magistrate and fined five dollars for the offence. His conviction was confirmed by the Supreme Court of the State of Alabama; on appeal to the U. S. Supreme Court it was reversed.

"The question is squarely presented to us, therefore, whether a State, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one State to another, and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the Act of Congress, passed July 24th, 1866, and other acts incorporated in Title LXV, of the Revised Statutes? Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies and prohibit the transaction of such business altogether. We are not prepared to say that this can be done.

"Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed; but we fail to see how a State can tax a business corporation *when it cannot tax the business itself.* Of course, the exaction of a license tax, as a condition of doing any particular business, is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business.

"Now we have decided that communication by telegraph is commerce, as well as in the nature of postal service, and if carried on between different States, it is commerce among the several States, and directly within the power of regulation conferred upon Congress, and free from the control of *State regulations, except such as are strictly* of a police character. * * *

"In our opinion, such a construction of the constitution leads to the conclusion that *no State has the right to lay a tax on interstate commerce in any form*, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a *burden on that commerce*, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases, that citation is hardly necessary. * * *

"We may here repeat, what we have so often said before, that the exemption of interstate and foreign commerce from State regulation does not prevent the State from taxing the property of those engaged in such commerce located within the State, *as the property of other citizens* is taxed, nor from regulating matters of local concern which may incidentally affect commerce, such as wharfage, pilotage, and the like."

It is contended that the principles of this case must govern the case at bar, notwithstanding the case of St. Louis vs. Western Union Tel. Co., the bearing of which upon the present case will be hereafter carefully considered and discussed.

Two out of the long line of cases, which have marked the limits of Federal control of interstate commerce, may be specially referred to without detracting from the merits of others. They are :

Robbins vs. Taxing Dist., 120 U. S. 493.
Steamship Co. vs. Pa., 122 U. S. 346.

In the former case the Court say :

"It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by State laws is, when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health and comfort of persons, and protection of property or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries and other commercial facilities, the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community, the imposition of taxes upon persons residing within the State or belonging to its population; and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the constitution and laws of the United States, and the imposition of taxes upon all property within the State, mingling with and forming part of the great mass of property therein. But in making such internal regulations, a State cannot impose taxes upon persons passing through the State or coming into it, merely for a temporary purpose, especially if connected with inter-state or foreign commerce, nor can it impose such taxes upon property imported into the State from abroad or from another State, and not yet become part of the common mass of property therein, and no discrimination can be made by any such regulations adversely to the persons or property of other States; and no regulations can be made directly affecting inter-state commerce. *Any taxation or regulation of the latter* character would be an unauthorized interference with the power given to Congress over the subject."

Robbins vs. Taxing Dist., 120 U. S. 493

And in the Steamship Co. vs. Pa. 122 U. S. 346:

"It is hardly within the scope of the present discussion to refer to the disastrous effects to which the power to tax inter-state or foreign commerce may lead. If the power exists in the State at all, it has no limit but the discretion of the State, and might be exercised in such a manner as to drive away that commerce, or to load it with an intolerable burden seriously affecting the business and prosperity of other States interested in it; and if those States, by way of retaliation, or otherwise, should impose like restrictions, the utmost confusion would prevail in our commercial affairs. In view of such a state of things, which actually existed under the Confederation, Chief Justice Marshall, in the case before referred to, said: "Those who felt the injury arising from this state of things, and those who are capable of estimating the influence of commerce on the prosperity of nations, perceive the necessity of giving control

> over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce among the States. To construe the power so as to impair its efficiency, would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity. 12 Wheat. 446."

In Moran vs. New Orleans, 112 U. S. 69, an attempt was made to impose a license tax upon owners of vessels engaged in interstate trade. The Court held that a municipality had no right to exact a tax for the use and enjoyment of a license granted by the United States. The language used is fully applicable to the present case, as the ordinance in terms imposes the charge "for the privilege of using the streets," etc., and thereby. as has been shown, for a privilege or license granted by the Government.

The Court say :

> "But here is not a tax on the profits and income after they have been realized from the business. It is a charge explicitly made as a price of the *privilege* of navigating the Mississippi river between New Orleans and the Gulf, in the coastwise trade, as the condition on which the State of Louisiana consents that the boats of the plaintiff-in-error may be employed by him, according to the terms of the license granted under the authority of Congress. The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States, to employ these particular vessels in the coasting trade ; and the State thus seeks to burden with an execution, fixed at its own pleasure, the very right to which the plaintiff-in-error is entitled under, and which he derives from, the Constitution and laws of the United States. The Louisiana statute declares expressly, that if he refuses or neglects to pay the license tax imposed upon him, for using his boats in this way, he shall not be permitted to act under and avail himself of the license granted by the United States, but may be enjoined from so doing by judicial process. The conflict between the two authorities is direct and express. What the one declares may be done without the tax, the other declares shall not be done except upon payment of the tax. In such an opposition, the only ques-

tion is which is the superior authority; and reduced to that, it furnishes its own answer."

To the same effect are:

California vs. Pacific R. R. 127 U. S. 40.

Philadelphia S. S. Co. vs. Pa, 122 U. S. 344.

Again the Court said:

> "A burden imposed upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting it."

Minnesota vs. Barber, 136 U. S., 313.

In Norfolk & W. R. R. vs. Penn., 136 U. S., 114-118, Mr. Justice Lamar said:

> "It is well settled by numerous decisions of this court that a State cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce or impose any burdens upon such commerce within its limits."
>
> "A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods."

Tel. Co. vs. Texas, 105 U. S., 460-465, was approved in Wabash & R. R. Co., vs. Ill., 118 U. S., p. 558, in which the decision of the Supreme Court of the State of Illinois was overruled on the construction of the Constitution and Laws of Illinois.

In Crutcher vs. Kentucky, 141 U. S., p. 47-62, Mr. Justice Bradley said:

> "The decisions to which we have already referred are clear to the effect that neither licenses or *indirect taxation of any kind nor any system of State Regulation*, can be imposed upon interstate any more than upon foreign commerce.

In Lyng vs. Michigan, 135 U. S., p. 161-166, Chief Justice Fuller said:

> "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by duties laid on the transportation of the subject of that commerce or on the

receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

UNDER THE STATUTE THE TELEGRAPH COMPANY IS A FEDERAL AGENT.

This tax or claim is a restriction upon an agent of the National Government without authority of Congress.

In regard to a license tax the Court said :

> "Undoubtedly the States may tax every subject of value within the sovereignty of the State belonging to the citizen as mere private property, but the power of taxation does not extend to the instruments of the Federal Government, nor to the constitutional means employed by Congress to carry into execution the powers conferred in the Federal Constitution."

Clifford J. Ward vs. Maryland, 12 Wallace, 427.
See Tel. Co. vs. Texas, 105 U. S., 460.

In Pambina Mining Co. vs. Penn., 125 U. S., p. 181-90, the Court held that a corporation is a person within the meaning of XIVth Amendment, and said :

> The only limitation upon the power of the State to exclude a foreign corporation from doing business within its limits and of having officers for that purpose, or to *exact conditions* for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal Government, or where its business is strictly interstate or foreign commerce.
>
> "The control of such commerce being in the Federal Government is not to be restricted by State authority."

This ordinance injuriously discriminates against the appellant and others similarly situated and encourages monopolies already existing.

Among the facts pleaded, and admitted by the demurrer, was the allegation that said ordinance, in effect and in fact, injuriously discriminates against the defendant and prevents fair and equal competition by defendant in the telegraph business.

The leading facts to sustain this statement are matters of common knowledge so notorious as to be accepted by every well-informed person and, even without the aid of the allegation quoted, to be considered proper subjects of judicial knowledge as defined in 1 Gr. on Ev. Secs. 5, 6 and 6a. The telegraph is recognized not only as one of the most potent instruments for good of which society is able to avail itself, but also as a necessary adjunct to government, business and society as at present constituted. Nothing that tends to destroy its efficiency, to prevent its successful working and development, and its regulation by that most potent of all regulators, competition, ought to be deemed legal on those lofty considerations of public policy, which are enforced alike by Federal and State tribunals, even if there were not constitutional or legal grounds affecting the question.

It is alleged in this case that the license fees and specific charges upon telephone and telegraph poles and wires and upon electric light poles and posts, and conductors claimed by said ordinance would amount to about fifty thousand dollars per year in the city of Baltimore alone; that said sums so assessed by said ordinance are largely in excess of any reasonable fee for the license and care of said city, for the regulation of said poles and wires and the labor attending the supervision and regulation of the same by the city authorities, the amount of said tax being at least ten times the cost attending the supervision and regulation of that kind of property by the city authorities, and that said license charge is equal to about twenty per cent. of the value of the property upon which it is imposed.

In the St. Louis case it appeared that, "the total valuation of all the defendant's property in the City of St. Louis in 1884, as fixed by the State Board of Equalization, was but $17,064.63, while the tax of $5 upon 1,509 poles amounted to $7,545, or more than 44 per cent. of the entire value of the property."

"A similar tax in the City of Philadelphia amounted to $16,000, while the facts showed that, at the most, only

$3,500 per year was required to cover every expenditure the city was obliged to make upon this account."

Phila. vs. W. U. Tel. Co., 40 Fed. Rep. 615.

It was truly remarked by Mr. Justice Brown, (148 U. S. 106) that "a like tax imposed by every city through which the defendant company carries its wires would result practically in the destruction of its business."

The remark is perfectly true. This tax or claim, and the manner of creating it, or any statute similar to it, is against the public policy of the United States, for this if for no other reason.

If the City of Baltimore can do this, every other city and borough and municipality can impose a like tax or charge without limit as to amount, and any State can make laws of like nature and effect without any restraint, and they would vie with each other to see which could get most revenue in that manner.

If all the cities of the United States should each impose and enforce the same amount of charge or tax upon telegraph poles within its limits, telegraphic communication and property would be instantly destroyed throughout the United States; at least competition would cease.

Can one or more cities do it and not another, or one or more States do it without the consent or authority of Congress?

Although the question may not be one of degree the *power* to do it must be judged by the effect of the extreme degree.

"The power to tax is the power to destroy," has become a legal maxim.

Said Chief Justice Marshall:

"The power to tax involves the power to destroy, the power to destroy may defeat and render useless the power to create." Again, "In the Legislature of the Union alone are all represented. The Legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all in the confidence that it will not be abused.

* * * * * * * * * * * *

"The American people have declared their Constitution and the laws made in pursuance thereof to be supreme, but this principle (the State right to tax) would transfer the supremacy, in fact to the States. If the States may tax one instrument employed by the Government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the Custom House; they may tax judicial process; they may tax all the means employed by the Government, to an excess which would defeat all the ends of Government."

* * * * * * * * * * * *

"The question is, in truth, a question of supremacy, and if the rights of the States to tax the means employed by the general government be conceded, the declaration that the Constitution and laws made in pursuance thereof shall be the supreme law of the land, is empty and unmeaning declamation."

"The States have no power, by *taxation* or *otherwise*, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress, to carry into execution the powers vested in the general government" (p. 435.)

McCulloch vs. Maryland, 4 Wheat. 431.

"Congress has regulated commerce by willing it shall be free, and it is therefore not left to the discretion of each State either to refuse a right of passage through her territory, or to exact a duty for permission to exercise such a privilege."

(Grier, J., in the "Passenger Case," 7 Howard, U. S., 463, approved in Ward vs. Maryland, 12 Wallace, 432.)

The entire public has an interest in the determination of this case. If this kind of tax can be enforced, in addition to other taxation, telegraph rates may be doubled, or increased, or the capital in the telegraph business will be employed at a loss and competition in the business will cease.

In Welton vs. State of Missouri, 91 U. S., 275, Mr. Justice Field, delivering the opinion of the U. S. Supreme Conrt, said:

> "The *power* of the State to exact a license tax of *any amount* being admitted, no authority would remain in the United States or in this Court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating State legislation favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows what would follow from the action of some of the States."

The Court also approved of the case of Brown vs. Maryland, 12 Wheaton, p. 446, and the able opinion of Chief Justice Marshall therein.

The power to tax this property in this manner necessarily challenges the right to exclude it altogether, and thus to thwart the policy of the other States in the Union. See Passenger Cases, 7 Howard, U. S., p. 463.

It is a fact of equal notoriety that the telegraph business of the United States was, until a very recent period, entirely under the control of the powerful company, which was thus referred to; and that the plaintiff-in-error is a competitor in business with that company establishing and maintaining such competition, which is greatly for the benefit of the public, under the disadvantage which always attends the opposition to an existing monopoly. As appears by the admitted allegations of fact already quoted, the plaintiff-in-error is at a great disadvantage in the matter of taxes, particularly if the full tax is to be enforced, as a large number of the poles of the more powerful company pass through cities upon the railroad right of way and are thus exempted from the jurisdiction of the city authorities; besides this, it appears that the telegraph poles of the other telegraph and telephone companies carry a much greater number of wires than do those of its competitor, and yet there is not in any proposed charge any consideration of the comparative number of wires carried. If then there is danger as suggested by Mr. Justice Brown of the destruction by means of such taxes of the business of the larger company, how much greater is such danger, in the case of a smaller company contending against a well-entrenched monopoly, of utter extinction, and as a result of an establishment of a permanent monopoly in this most necessary adjunct of modern society. Can it be doubted then in view of this fact, that the ordinance in question and all others of similar character are obnoxious to the objections stated in the foregoing proposition?

Article 41 of the Maryland Bill of Rights declares that monopolies are odious contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered.

It is held that a municipal corporation cannot create a monopoly. And that the State cannot confer upon a municipality powers which the State does not possess.

Sayre vs. Phillips. 148 Penn. St., 482.

This court has decided that a state cannot by law create a monopoly in the telegraph business.

W. U. vs. Pensacola, 96 U. S., p. 1.

The following cases are conspicuous examples of ordinances declared void because they were unjust, unequal and unfair:

Ex parte Frank, 52 Col., 606.

Conshohocken vs. Fennel, 5 Pa. Co. Ct. Rep. 65.

Easton vs. Easton Beef Co., 5 Pa. Co. Ct. Rep. 68.

Sayre vs. Phillips, 148 Pa. St. 482.

In Yick Yo vs. Hopkins, 118 U. S., 373, above cited, this Court says:

> "Whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons by the broad and benign provisions of the 14th Amendment to the Constitution of the United States. Though the law itself be fair on its face aud

impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this Court in Henderson vs. Mayor of N. Y., 92 U. S., p. 259; Chy Lung vs. Freeman, 92 U. S., 275; Ex parte Virginia, 100 U. S., 329; Neal vs. Delaware. 103 U. S., 370; Soon Hing vs. Crowley, 113 U. S., 703."

This ordinance discriminates against the property of defendant in imposing the taxes. This pole tax is in addition to the amount of taxes imposed upon the property of other citizens and corporations as appears by allegations of fact admitted.

In Charlotte R. R. vs. Gibbs, 142 U. S. 391, Justice Field said:

> "If the tax were levied to pay for services in no way connected with the railroads, as, for instance, to pay the salary of the executive or judicial officers of the State, whilst railroad corporations were at the same time subjected to taxation upon their property equally with other corporatious for such expenses, and other corporations were not taxed for the salaries mentioned, there would be just grounds of complaint of unlawful discrimination against the railroad corporations and of their not receiving the equal protection of the laws."

In this case the tax was on the gross income of railroads, proportioned to the number of miles owned in the State and was to pay special expenses of the railroad commissioners.

The Case of St. Louis vs. Western U. Tel. Co. 148 U. S. 92, considered.

The reliance of the defendant-in-error is upon the case of St. Louis vs. Western U. Tel. Co., 148 U. S., 92. The claim set up in this suit was resisted upon full consideration of the St. Louis case, and under the conviction of the plaintiff-in-error, and the advice of its counsel that, notwithstanding the decision in the St. Louis case, upon a fair consideration of all the facts of the Maryland case, the City of Baltimore ought not to recover. It is said with great frankness by the counsel for the defendant-in-error, that the St. Louis case was the moving cause of the Baltimore case, and this statement is pregnant with suggestion of the ultimate result of a final settlement of the law upon the lines of the St. Louis decision. In the case at bar, an appeal to the courts was determined upon for two reasons:

FIRST. In view of all the circumstances under which the St. Louis decision was made, it was and still is our hope to have a reconsideration of the important and far-reaching questions involved in this subject, of the power of municipal corporations to exact a license on the poles necessarily used within their limits by telegraph, telephone, electric light and electric street railway companies.

SECOND. It is contended that the St. Louis decision does not necessarily or properly control the Baltimore case, the facts of the two cases and the corporate powers of the two cities, both in their origin and their scope being entirely different.

Let us consider these two points in their order.

Reasons for a Review of that Case.

1st. The St. Louis decision went entirely on grounds which originated with the court itself, not alluded to by the counsel on either side in argument, and in support of which no authority whatever was adduced. It was essentially a new departure, the far-reaching importance of which has already been alluded to and cannot be successfully questioned. A thorough examination of all the papers filed in this court in that case, including the record, four briefs on the principal hearing, the petition for rehearing and five briefs on that motion, discloses the fact that the question of the right of the City of St. Louis to rent out the streets to the telegraph companies was not suggested or referred to in the argument on either side. The surprise, with which the decision, upon the ground that controlled it, affected counsel engaged in the case appears by the following extract from the petition for a rehearing, which was signed by the distinguished author of the text book on Municipal Corporations, which is recognized the world over as the leading authority on that subject:

> It is respectfully submitted to the Court, that, under this legislation, the right and authority of the telegraph company to use the streets of the city is conferred upon it directly by the State. It is therefore a right which the defendant company claims not under the charter of the city, but under the general legislation of the State—a right therefore derived directly from the State and in no sense derived from the city. It is furthermore respectfully and earnestly suggested to the Court that if this is so, and the opinion is to stand as it is, it affirms a right, in a subordinate municipality, notwithstanding and in the face of such legislation, to exact payment in the nature of a rental, a proposition which is novel, and which if it is held to be law should only be so held after the most thorough argument and mature consideration. Counsel beg to repeat that they are moved to this course solely because they are under a double duty to the Court and to their client, since, if no rehearing be granted and the opinion stands unmodified as it is before the case can be heard again in the Court of Appeals, action similar to that taken by the City of St. Louis in exacting rental under statutes similar to that of the State of Missouri, will be extensively adopted in other States, and the defendant will be put to multiplied litigations and enormous expense, and, moreover, the appellate jurisdiction over the judgment on the re-trial will probably end with the Circuit Court of Appeals. This Court will be bound in fetters of iron by your honor's opinion, as you shall leave it in this case, and with probably no right to revise that opinion in this Court under the existing law regulating writs of error and appeals from the Circuit Court of Appeals.
>
> For these reasons the defendant-in-error respectfully presents this petition for a rehearing, and prays that such rehearing may be granted at an early date to be fixed by the Court."

The argument upon the petition for a rehearing was addressed almost entirely to the question whether the control of the streets of St. Louis was vested in the Legislature of the State or in the municipality itself. There underlies this whole subject, however, without respect to the surface distinctions between individual cases, growing out of the constitutional and statutory law of the particular subject, and the exact terms of the municipal legislation in one case, a great fundamental question, which does not seem to have been discussed in the argument or in the opinion of the Court upon the application for a rehearing. That is, how shall we define this term "control" as applied to the streets of the city—What is its nature?—What are its limits?—What powers of alienation either by lease or conveyance does it contain? Surely one need but stand, at the present day, at the side of the main thoroughfare of one of our great cities, and observe the vastly increased number of uses to which such a street is necessarily put, and how many agencies affect the well-being of the city, state and nation, which depend upon its proper regulation, to appreciate the fact that no question of the past has been more worthy of careful consideration or deliberate and correct determination by this high tribunal, than the definition of the rights and interests involved in it. With the utmost deference, it is contended that the opportunity has not yet occurred for this Court to give such consideration to this subject as its importance demands. In the opinion of the court, overruling the application for a rehearing, Mr. Justice Brewer, speaking for the court, said:

> "We see no reason to change the views expressed as to the power of the City of St. Louis in this matter. Control over the streets resides somewhere. As the legislative power of a State is vested in the legislature, generally that body has the supreme control, and it delegates to municipal corporations such measure thereof as it deems best. The City of St. Louis occupies a unique position. It does not, like most cities, derive its powers by grant from the legislature, but it framed its own charter under express authority from the people of the State, given in the constitution. Sections 20 and 21 of Article 9 of the Constitution of 1875 of the State of Missouri, authorized the election of thirteen freeholders to prepare a charter to be submitted to the qualified voters of the

city, which, when ratified by them, was to "become the organic law of the city." Section 22 provided for amendments, to be made at intervals of not less than two years and upon the approval of three-fifths of the voters. Sections 23 and 25 required the charter and amendments to always be in harmony with and subject to the constitution and laws of Missouri, and gave to the general assembly the same power over this city, notwithstanding the provisions of this article, as was had over other cities. In pursuance of these provisions of the constitution a charter was prepared and adopted, and is, therefore, the "organic law" of the city of St. Louis, and the powers granted by it, so far as they are in harmony with the constitution and laws of the state, and have not been set aside by any act of the general assembly, are the powers vested in the city. And this charter is an organic act, so defined in the constitution, and is to be construed as organic acts are construed. The city is in a very just sense an "*imperium in imperio*." Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its charter.

The opinion from which this extract is taken decides simply that the City of St. Louis had the power over its streets, which is ordinarily vested in the Legislature of the state. The learned Justice very truly calls attention to the fact that that city occupies a unique position, and that instead of deriving its powers from the said Legislature, as do municipal corporations generally, they were derived by it from the people of the state of Missouri, from whom also the Legislature derived its powers, and that that city was acting not under a legislative charter, but under one framed and adopted directly under the provisions of the Missouri Constitution. The limits of the authority over streets exercised by the city in that case, but by the Legislature in other cases, and unquestionably in Maryland, were not defined. True it is said "control over the streets resides somewhere," but what is meant by the word "control" as applied to streets is neither discussed nor cited. This surely is a question of sufficient importance, by reason as well of its relation to the great subject of taxation and interstate commerce as to the magnitude of the interests involved, to entitle it to consideration by this Court with the assistance of argument by the ablest and most experienced counsel, not only those who may be engaged in a particular case, but even of others interested in the question involved. The assistance to be derived by the Court from such argument is too well recognized to require comment.

The decision of a case upon a point not argued is by no means entirely unprecedented, but that in this case it could not be attributed to inexperience, nor to want of ability of the counsel, is clear, not only from an examination of their briefs, but also from the further fact that one of them is an authority and text writer upon the subject involved.

THE TWO CASES DISTINGUISHED.

2nd. The quotation made from Mr. Justice Brewer's opinion, while commenting on the unusual powers confided in the City of St. Louis by the people of Missouri, recognizes the principle that generally the legislature has supreme control of the streets of a city and that the municipality can exercise no powers other then those derived by grant from the legislature. Therein the court at once differentiates the St. Louis case from the one at bar, and shows why upon the record now before the court this case should not be summarily disposed of upon the present motions.

The primary difference then between the two cases is that St. Louis derived its control over the streets from its charter, while Baltimore had no authority in the premises, except such as was conferred upon it by the legislature. The charter of St. Louis as it appears in the abstract given by Mr. Justice Brewer (149 U. S., 468.) contains an express power not only to "regulate the use of streets" etc., but also in the same article "to license, tax and regulate telegraph companies or corporations, streets, railroad cars," etc.

The Act of the legislature of Maryland already cited, authorized the City of Baltimore "to regulate the use of streets," etc., by railway tracks, and telegraph and other wires and poles.

The St. Louis ordinance number 11,604, as amended by number 12,733, as appears in the record of the case in this court, in the course of detailed provision respecting telegraph and telephone poles, contains the following section:

> "From and after the first of July, 1884, all telegraph and telephone companies, which are not by ordinance taxed on their gross income for city purposes, shall pay to the City of St. Louis, for the privilege of using the streets, alleys and public places thereof, the sum of five dollars per annum for each and every telegraph or telephone pole erected or used by them in the streets, alleys and public places in said city."

Section 14 of the same article makes the violation of the ordinance punishable by fine.

The Baltimore ordinance is printed with the brief of the defendant-in-error.

The first makes the charge "for the privilege of using the streets," etc., the other makes the charge directly upon the poles. This verbal difference is, however, not very material, as the real difference is further back, and is one of corporate power and not of verbal expression. It is proper to note, however, that the St. Louis ordinance nowhere characterizes the charge on poles as a tax or a license as does the Baltimore ordinance with respect to every detail of its provisions.

The opinion of Mr. Justice Brewer gives to the word "regulate" very broad import and he illustrates his meaning by referring to it as "the word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce," and remarks how broad and comprehensive that has been held to be. It might also be further remarked that broad and comprehensive as that power of regulation has been held to be, it has never yet been treated by Congress as including any power of taxation nor been resorted to for that purpose. It is respectfully submitted that the word "regulate" in the connection in which it is used in the St. Louis ordinance, and the Baltimore statute is always construed as referring to a grant of police power, and it is a well-settled principle that this power can never be used as a cloak for taxation or the raising of revenue. Nowhere is this better settled than in Maryland by the very court, whose decision comes up for review in the case at bar. The decisions of that court herein cited and many others, which it is not deemed necessary to refer to, lay down the rule that a city ordinance for police regulation is void if it is made a means of revenue. (Vansant vs. Stage Co. 59 Md. 334 and other cases cited.) This rule of construction, adopted by the Maryland Court of Appeals with respect to the municipal ordinance of that city, belongs to the class of rules to which is properly applied the rule of conclusiveness invoked for the defendant-in-error. In enunciating this principle, the Maryland Court did no more than to adopt the well-settled principle of constitutional and statutory law.

Judge Cooley in his Law of Taxation (Ch. 19. 1st Ed. 396) says:

> "There are some cases in which levies are made and collected under the general designation of taxes, or under some name employed in revenue laws, to indicate a particular class of taxes, where the imposition of the burden may fairly be referred to some other authority than to that branch of the sovereign power of the state under which the public revenues are apportioned and collected. The reason is, that the imposition has not for its object the raising of revenues, but looks rather to the regulation of relative rights, privileges and duties, as between individuals, to the conservation of order in the political society, to the encouragement of industry, and the discouragement of pernicious employments. Legislation for these purposes, it would seem proper to look upon as being made in the exercise of that authority which is inherent in every sovereignty, to make all such rules and regulations as are needful to secure and preserve the public order, and to protect each individual in the enjoyment of his own rights and privileges by requiring the observance of rules of order, fairness and good neighborhood, by all around him; This manifestation of the sovereign authority is usually spoken of as the police power.
>
> The distinction between a demand of money, under the police power, and one made under the power to tax, is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue."

He further says that license fees may be imposed:

1. For taxation. 2. For revenue. 3. To give monopolies. 4. For prohibition. The last two are passed over and the distinction between the other two is stated.

"The grant of a license may be made by the state directly or it may be made indirectly through one of the municipal corporations of the state, of the indirect grant it is to be observed, that a municipal corporation, as such, has no inherent power to grant licenses or exact license fees; it must derive all its authority in this regard from the state, and the power must come by direct grant and cannot be taken by implication." * * *

"If a revenue authority is what seems to be conferred, the extent of the tax, when not limited by the grant itself, must be understood to be left to the judgment and discretion of the municipal government, to be determined in the usual mode in which its legislative authority is exercised; but the grant of authority to impose fees for the purposes of revenue would not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose.

"Where the grant is not made for revenue, but for regulation merely, a much narrower construction is to be applied. A fee for the license may still be exacted; but it must be such a fee only as will legitimately assist in the regulation; and it should not exceed the necessary or probable expense of issuing the license, and of inspecting and regulating the business which it covers. If the state intends to give broader authority, it is a reasonable inference that it will do so in unequivocal terms."

Cooley on Taxation (1st Ed., 408).

Judge Cooley's opinion is very clearly expressed upon two points:—first, that regulation and taxation are not synonymous, and that the former does not include the latter, and second, that taxation cannot be imposed under the guise or name of regulation, and an attempt to do this will make void a statute or ordinance.

Burroughs in his work on Taxation lays down the same principles.

"In the state alone inheres the power of taxation. The political subdivisions of the State, made for the purpose of more efficiently administering the affairs of State, have no such inherent power; they have such power only as is delegated to them. The nature of all of these subdivisions of the State is the same; whether it be the city with the million of inhabitants, or the school district in a remote part of the State, with a few hundred inhabitants, all its powers are derivative; it has such powers as are delegated by the Legislature, and no more. To ascertain these powers we must look to the statute delegating the powers. This is to be the guide to direct us; this is our chart in discussing municipal powers, and this makes the distinctive difference in the

> discussion of questions as to the power of taxation as applied to States and municipal corporations. The Constitution of a State is not the source of the power of the Legislature to tax. It is merely a limitation on a power inherent in the Legislature. But the charter of a municipal corporation, the statute defining its powers, is the source of its power to tax. It has such power on the subject as the statute gives, and no more. The purpose of the local tax is local benefit. The local government can administer the affairs of its locality more advantageously than can be done by the State, and therefore the power to tax is given for the purpose of such local government. This power must be plain and express; it cannot be gained by prescription, no length of time justifies it, it originates in the legislative will, declared by express statute and it must appear in the statute by express words or necessary implication."

Burroughs on Taxation, Sec. 128, p. 370-1.

Then after citing many cases by way of illustration, he continues:

> "These illustrations show with what vigor the courts adhere to the doctrine that municipal corporations have only such powers of taxation as are plainly conferred by the charter. And when the power to tax is admitted, it must be strictly pursued, and all the conditions precedent and subsequent must be fulfilled in the exercise of the power." Ib. 372.

This tax cannot be imposed under the authority to levy taxes for the support of the city government.

The grant to a municipal corporation of power to levy taxes for municipal purposes will not justify any other than the ordinary taxes.

Bur. on Tax, 418.
do. do. Ch. 20.

Cities and counties are but local divisions of the State, organized and chartered for the more efficient and economical administration of government. As such they have no inherent power of taxation.

Daly vs. Morgan, 69 Md., 467.

They can levy no taxes general or special upon the inhabitants or their property unless the power be plainly and unmistakably given or conferred.

St. Mary's Ind. School *vs*. Brown, 45 Md., 311.
Cooley's Const Lim, 231 (Ed. of 1890), *226*.
Burrough on Tax, 418.

A consideration of much weight in favor of permitting this case to be fully and fairly argued in the usual manner is presented with great force by Judge Dillon in the extract from the petition for a rehearing in the St. Louis case. It is only because the annual tax assessed against the plaintiff-in-error is less than two thousand dollars that this case took such a course, as to bring the general subject discussed in the St. Louis case again before this Court for its consideration. All such cases hereafter tried in the U. S. Circuit Courts will go for final determination to the Courts of Appeals, which would naturally, as Judge Dillon says, "be bound by fetters of iron by the opinion in the St. Louis case." This case presents an opportunity for the reconsideration of that opinion as to which there is among all parties affected by it an earnest and unanimous desire that the questions involved may be again heard in this Court upon full argument. If in that event there should be no modification of the views then expressed, and they should be held to be applicable to cases like the one at bar, it would, of course, be necessary for parties affected to accommodate themselves to it, and it would be a proper subject of consideration by Congress whether remedial legislation would be necessary. At all events, such parties would feel that they had, at least, had a hearing upon a subject so deeply affecting their interests, and, possibly, it may be said, without exaggeration, fatal to their existence.

The ordinance in question is in conflict with the Constitution and Laws of Maryland and is therefore void.

The objections here taken consist largely of violations of guarantees which are secured to every citizen by the XIVth amendment of the U. S. constitution, and therefore must be considered by the Court.

THE CITY COUNCIL OF BALTIMORE HAD NO AUTHORITY OR POWER, BY EXPRESS STATUTE OR IMPILED BY LAW, TO MAKE SAID ORDINANCES OR TO CREATE THE CLAIMS UPON WHICH THIS JUDGMENT IS FOUNDED.

It is submitted that the questions presented in the case at bar are entirely different from any that have ever been considered by any court upon the question of the right or power to impose a specific tax or assessment upon telegraph poles without regard to size, value, extent of use, etc.

Under article eleven of the constitution of Maryland, adopted in 1874, it is provided that the City of Baltimore shall be subject to legislative control by the State.

The Constitution, Art. XI. of The City of Baltimore provides,

SEC. 8. All laws and ordinances now in force applicable to the city of Baltimore, not inconsistent with this article, shall be, and they are hereby, continued until changed in due course of law.

SEC. 9. The general assembly may make such changes in this article, except in section seven thereof, as it may deem best; and this article shall not be so construed or taken as to make the political corporation of Baltimore independent of or free from the control which the general assembly of Maryland has over such corporations in this State.

The Statute Laws, 1890, Chapter 370, Section 819 A, and Section 721, Art. 4, Public local laws, are the only possible authority for this or any similar ordinance.

They are as follows, respectively :

Maryland Public Local Laws 1860, Art. 4, Sec. 32, City of Baltimore.

"Section 721. The Mayor and City Council may pass ordinances for preserving order, securing property and persons from violence, danger or destruction, protecting the public and city property, rights and privileges from waste or encroachment and for promoting the great interests and insuring the good government of the city."

Laws of Maryland, Chapter 370, April 3d, 1890.

"Section 819 A. The Mayor and City Council of Baltimore shall have power to regulate the use of streets, lanes and alleys in said city by railway or other tracks, gas or other pipes, telegraph, telephone, electric light or other wires and poles in, under, over or upon the same, and may require all such wires to be placed under ground after such reasonable notice as they may prescribe.

Article 14 of Bill of Rights provides, "that no aid, charge, tax, burden or fees ought to be rated or levied under any pretense without the consent of the legislature."

Is it shown that there is any legislative authority or permission to impose this tax ?

The citations from Maryland law in the brief of defendant-in-error show nothing more as authority for the claim that the city "has had conferred upon it complete and full power and control over the streets of Baltimore." It has power to regulate their use, to exercise police powers over them and those using them for the purposes specified, but there is not a line giving power of taxation or authorizing the city to exact tolls or impose licenses for the legitimate use of its public highways and thoroughfares.

And their use for telegraph and telephone wires and poles is among the uses designated as legitimate by specific enumeration in the act of assembly.

A POLICE ORDINANCE REALLY FOR REVENUE, IS VOID.

This ordinance is nothing if not a means of revenue, but under repeated decisions of the Maryland Court of Appeals a city ordinance for police regulation is void if it is made a means of revenue. This was held in a case to which constant reference is made.

Vansant *vs.* Stage Co., 59 Md., 334.

In a later case power was given by the Legislature to erect and regulate markets and it was provided that the city authorities "may lease, sell or dispose of the stalls and stands." An ordinance setting apart a portion of a market for the sale of fresh and frozen fish and crabs, required an annual license of one hundred dollars to be paid by everyone before engaging in the fish and crab business in that market. This section was held to be void as being an effort to raise revenue under the guise of exercising the police power.

The court said "the taxing power belongs to the Legislature; and it will not be held as conferred on a municipal corporation unless it be by express and unequivocal language or by *necessary* implication. Referring to the license fee the court said:—"It is largely in excess of that charged for license of omnibuses, which this court pronounced void in *Vansant's case*, and is certainly largely in excess of any supposable expense for issuing the license."

State vs. Rowe, 72 Md. 548.

These cases and the principles therein declared were approved in

Commrs of Easton vs. Conway, 74 Md. 263.

This court decided that a regulation is not a tax.

W. U. Tel. Co. *vs.* Pendleton, 122 U. S. 359.

And again, that a tax is a regulation when applied to means of interstate commerce and is within the prohibition of U. S. constitution that prevents any regulation of interstate or foreign commerce without authority of Congress.

Henderson vs. Mayor, 92 U. S. 259.

Other cases discussing effectively the limitations on the power of enacting municipal ordinances are found in the reports of the Supreme Court of Pennsylvania.

An ordinance may *regulate* but not *restrain* trade.

Northern Lib. vs. North Lib. Gas Co., 12 Penn., 321.

Kneedler vs. Norristown, 100 Penn., 373.

Sayre *vs*. Phillips, 148 Pa., St., p. 482.

In Sayre *vs*. Phillips the Supreme Court of Pennsylvania says: "If a statute or a municipal ordinance is in reality directed only against certain persons, who are engaged in the same trade or pursuit, in aid of some at the expense of others, such statute or ordinance *is not a police* but a *trade regulation*, and it has no right to shelter itself behind the *police power* of the state or municipality."

The State Legislature never intended and did not in fact surrender the State control of the streets in Baltimore to the Mayor and City Council of Baltimore.

For examples of the exercise by the State Legislature of control of the streets in the city of Baltimore, it is only necessary to refer to cases cited for the defendant-in-error —Koch vs. N. A. R. R. Co., 75 Md., 222; N. B. & P. R. R. vs. Baltimore, 75 Md., 247; and Lake Roland E. Ry. Co. vs. M. & C. C. of Balto., 72 Md., 357.

THE CONTROL IS WHOLLY IN THE LEGISLATURE.

These are the only cases cited for defendant-in-error, to sustain the proposition that, "the completeness of this power and control by the city of Baltimore over its streets, has been repeatedly announced and declared by the Court of Appeals of Maryland." The cases do show that no control over those streets by the city is recognized, except such as has been expressly granted by the Legislature. They are all cases in which street railways operated by electricity were permitted by ordinance *after*, and *only after* express grants of power to the city to permit such use. In the first case the street railway was for this reason permitted, while so much of the ordinance as permitted an elevated railroad was held void because the Legislature had not authorized it.

Even if it desired to do so the Legislature of a State cannot constitutionally transfer to municipal corporations the power of determining upon what property, taxes and assessments shall and what shall not be imposed.

> Cooley Const. Lim., p. 137, 6th ed., 632.
>
> State *vs.* Hudson Co., etc., 37 N. J., L. 19.
>
> Brewer Brick Co. vs. Brewer, 62 Me., 62; 15 Am. Repts., 395.
>
> Wilson *vs.* Sutter Co., 47 Cal., 91.

In Maryland the state has strictly guarded against any such result by the constitutional provisions above cited.

So jealous were the people of Maryland of the permanent right of the State to exercise all legislative control, either directly through the Legislature or under its authority by the municipal corporation, that Art. 4 of the Bill of Rights provides :

That the people of this State have sole and exclusive right of regulating the internal government and police thereof, as a free severeign and independent State.

The Legislature of Maryland has legislated directly upon the subject of licenses in the City of Baltimore, and provides that they shall be required of persons carrying on the following occupations :—Billiard Tables, Dealers in hay, straw or mules, Horse dealers, Liquor, Pawn Brokers, Peddlers, Real Estate Brokers, Theatrical and other public amusements, and Wood dealers.

This shows clearly the character of the fund described in the ordinance, as "the appropriation for licenses," and the charge to that fund of the expense of tin plates, required by the pole license ordinance, indicates clearly that it is an ordinance to raise revenue and not under the police power.

That the legislature of Maryland did not intend to confer upon the City of Baltimore the authority to exact licenses from telegraph companies, is apparent from the fact that the legislature itself provided for licensing such companies. By the Public General Laws of Maryland, it is provided that telegraph companies should be licensed to do business in the State and should pay for the privilege three hundred dollars per annum.

Pub. Gen. Laws, pp. 939, 941.

The laws of the State also provide that persons injuring poles or wires of such companies shall be indictable.

From this legislation it would appear by necessary inference that the legislature did not intend to authorize the imposition of a license tax upon such companies, by the local legislation of municipalities, and that having paid the state license, such companies are entitled to carry on their business in any part of the state, whether within or without the City of Baltimore. The right to carry on the business of a telegraph company would carry with it by necessary implication the right to erect poles and wires without the imposition of any other or further burden.

This tax is unequal and not according to the value of the class of property upon which it is imposed.

Article 15 of Maryland Bill of Rights provides that property shall be taxed according to its value.

In the case of State *vs.* Cumb. & Penn. R. R. Co., 40 Md., 51, the court said in regard to this article of the Bill of Rights.

"The restriction is only intended to prevent an arbitrary taxation of property according to kind or quality without regard to value.

" What is the character of the tax imposed by the act in question? It is beyond all doubt a direct and specific tax upon coal (two cents per ton) and therefore a tax upon property. It is not assessed with reference to any uniform value of the coal, nor with reference and in uniformity to any rate of taxation imposed upon the other property in the State and *is therefore a specific arbitrary tax* for the support of the government on a part of the personal property of the State, without regard to value, uniformity or equality. Upon the same principle that this tax of two cents per ton is attempted to be imposed, if legal, the State could impose fifty cents or even a dollar per ton on all the coal mined and transported."

"Taxes collected for municipal purposes are taxes imposed for the support of the government and are subject to the constitutional prohibition against inequality."

Daly *vs.* Morgan, 69 Md., 460.

Wells *vs.* Com. of Hyattsville, 77 Md. 125.

Constitutional provisions for the purpose of insuring equality in the levy and collection of taxes apply equally to all kinds of taxation, whether State, county, or municipal.

SPECIFIC TAXES ARE INVALID.

The specific tax upon telegraph poles, as such, without regard to size, height or material of which it is composed, and physical condition and extent of business, is unequal. The court will take judicial notice that all Telegraph Companies are not equal in extent, kind of property and amount of business &c., yet the same amount of tax is imposed on each and every Telegraph Company by this ordinance.

" A system of taxation which imposes the same tax upon every species of property, *irrespective of its nature, or condition, or class,* will be destructive of the principal of uniformity and equality in taxation, and of a just adaptation of property to its burdens. "

Pacific Express Co. vs. Siebert, 142 U. S. 339.

If a tax is a burden upon some persons and not upon others, under the same circumstances and conditions, it is then a violation of the Fourteenth Amendment.

Pacific Express Co. vs. Siebert, 142 U. S.

See also U. S. R. S., § 1977.

In the case of Pickard vs. Pullman S. Car Co., 117 U. S., p. 38-51, which involved the validity of a specific annual license charge, on each car, by a statute of Tennessee, the question involved was first brought before the Court of Chancery of Tennessee, on the same facts, for the license tax of 1877, between the same parties. It was held valid and the judgment was affirmed by the Supreme Court of Tennessee. The same claim for subsequent years was made in this suit. In the opinion by Mr. Justice Blatchford he said : "We have given to the views set forth by the Tennessee Chancery Court the consideration due to the judgments of that tribunal, but are unable to concur in its conclusion," and the license charges claimed for cars that were engaged in interstate transportation was held to be void. See Tennessee vs. Pullman S. Car Co., Ib., p. 51, argued with the above case.

Also Harman vs. Chicago, 147 U. S. 396.

A State law imposing a tax or license charge upon each locomotive, passenger and freight car, &c., being not merely a police regulation, but an expedient for raising revenue, involves a tax upon the passengers and freight transported, and is unconstitutional as interfering with commerce between the State, where the cars, &c., run into another State.

Minot vs. P., W. & B. R. R. Co., 2 Abb., U. S., Reports, 323.

Pickard vs. Pullman S. Car Co., 117, U. S., p. 38 and Ib. 51.

This specifix tax or license claim upon the property of defendants ignores theConstitution and laws of Maryland on assessment or taxation, for they require that all taxes upon property shall be according to value, and therefore this tax or claim is unequal and deprives the defendants of the equal protection of the laws in regard to assessment and taxation of property, which persons and other like corporations enjoy.

The terms "equal and uniform" and "according to value" preclude a discrimination as between those carrying on the same business.

They also preclude a specific tax on any species of property in any manner, the value of which is not uniform.

Imposing a tax of 2⅛ per cent. on real estate, $\frac{3}{10}$ per cent. on bank stock and ½ per cent. upon all personal property is against a constitutional provision that taxes shall be *ad valorem*.

Savannah vs. Weed, 84 Ga., 603.

A charge of $1 per mile laid upon each railroad track in the state is in violation of a constitutional provision requiring uniformity.

Pittsburgh, C. S. L. and L. R. Co. v*s*. State, 49 Ohio, 189.

A tax upon a railroad according to its length is unconstitutional.

4 S. C. Rep., 376.

In Sayre v*s*. Phillips, 148 Penn. St., p. 482, the court says:

> "When the State creates a city or borough it cannot confer upon the municipality powers that the State does not possess.
>
> "It cannot give its creature immunity from the settled limitations that bind its own action. The municipality remains a part of the State after its creation as truly as the town or village was a part of the State before it acquired a corporate character. Only in a matter of local government is its situation changed. *It can have no better right to adopt discriminating trade regulations than he State can.*"

It is a fact admitted by the demurrer that a portion of this tax is to be applied to county and State purposes and the city council has no authority to impose this tax for such purposes.

This ordinance by imposing this specific tax in effect determines the value of the property—that is, it assumes that all of this class of property is of the same value. This renders it void in any event.

The legislature itself cannot by law make or determine the value of property for taxation.

People vs. Hastings, 29 Cal., 449.

Burrows, 288 Chap. 12.

A legislative enactment making or determining the value of property for taxation would be the blending of the legislative and judicial functions and also would deprive the property owners of due process of law and giving them no opportunity to be heard in the matter.

Due process of law is defined by the United States Supreme Court in Pearson vs. Yewdall, 95 U. S., 294,

Chief Justice Waite says as a test of the constitutionality of a statute that, "It is due process of law when ample provision is made for an inquiry as to damages before a competent court and for a review of the proceedings upon an appeal to the highest court of the state."

As to due process of law as viewed by the courts of Maryland, see

Ulman vs. City of Baltimore, 72 Md., 587.

State vs. Rowe, 72 Md., 548.

Com's of Easton vs. Conway, 74 Md., 263.

UNITED STATES CONSTITUTION AND LAWS SPECIALLY INCORPORATED INTO THE MARYLAND BILL OF RIGHTS.

It is worthy of note that the Bill of Rights of Maryland, in addition to the usual fundamental guarantees, such as trial by jury, and that no person shall be deprived of life, liberty or property but by the judgment of his peers or by the law of the land, contains the following somewhat unusual provision :

ART. 2. The Constitution of the United States, and the laws made, or which shall be made, in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, are, and shall be, the supreme law of the State; and the judges of this State and all the people of this State are and shall be bound thereby, anything in the constitution or law of this State to the contrary notwithstanding.

The effect of this is that all provisions of the U. S. Constitution and the laws of Congress for the protection and security of persons and property in addition to the operation of the Federal Constitution by its own force upon that of Maryland, are thereby made part and parcel of the constitution of Maryland, so that the XIVth Amendment of the U. S. Constitution and the laws enacted by Congress for the enforcement thereof not only operate *proprio vigore*, but they are specially adopted into the said constitution and have a double sanction. Such a provision applicable to this ordinance upon the facts admitted by the demurrer is, Section 1977 of U. S. Rev. Stat., which provides that all taxes, licenses and exactions shall be uniform, and that the full and equal benefit of all laws and proceedings for the security of persons and property shall be available to all persons within the United States.

This case should not have been remanded by the Circuit Court to the Court of Common Pleas of Baltimore City.

Before the Act of 1875 there was no review by writ of error or appeal of the action of the Circuit Court on a motion to remand. The Act of 1875 made such orders reviewable, but by the Act of 1887, as construed by this Court, the right of such an appeal or writ of error was taken away,

The act of February 25, 1889, 25 Stat. 693, c. 236, provides that:

> " In all cases where a final judgment or decree shall be rendered in a Circuit Court of the United States in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be

> entitled to an appeal or writ of error to the Supreme Court of the United States to review such judgment or decree, without reference to the amount of the same; but in cases where the decree or judgment does not exceed the sum of five thousand dollars, the Supreme Court shall not review any question raised upon the record except such questions of jurisdiction."

In the case of R. & D. R. R. Co. vs. Thouron, 134 U. S. 45, was an appeal for an order of the Circuit Court remanding the case to the State Court, and it was claimed that the appeal would lie under the Act of 1889 above quoted. The Supreme Court held:

> "The words 'a final judgment or decree,' in this act, are manifestly used in the same sense as in the prior statutes which have received interpretation, and these orders to remand were not final judgments or decrees, whatever the ground upon which the Circuit Court proceeded."

It is submitted that when the case reaches this Court upon a writ of error to a final judgment in a case where a motion to remand has been granted, the spirit of the Act of 1889 requires that the question of jurisdiction should be open to review here, as fully as in every Federal question of the cause. If this is not so, the Act of 1889 would be rendered practically nugatory in possibly the largest class of cases in which the question of jurisdiction is raised. If a motion to remand was wrongfully granted, then not only did the Circuit Court err in its action, but the State Courts, from which the case reaches this Court, were without jurisdiction. And although under the ruling of R. & D. R. R. Co., vs. Thouron, the decision of the Circuit Court on the motion was not, at the time it was made, a final judgment, yet as soon as final judgment in the case was entered by the Maryland Court of Appeals, the decision of the Circuit Court became, in effect, a final judgment on a question of jurisdiction. And it would be an anomaly, when the purpose of Congress is clearly shown to give a right of review when ever the question of jurisdiction is raised, that the granting or refusal of a motion to remand should be held to be final and conclusive. To hold that in a case like this the decision of the Circuit Court may be considered here, would be in accordance with the uniform current of decisions prior to the act of 1887, and the manifest purpose of the Act of 1889 was to modify the hard and fast rule laid down by the Act of 1887. If the Court should hold that the actiou of the Circuit Court is now reviewable, that would be a Federal question upon which an opportunity should be given for the presentation of the argument, which was addressed to the Circuit Court. In advance, however, of the ruling of the Court upon the point, whether that action is reviewable, it is unnecessary to present the argument and authorities on the quetion of the remand.

CONCLUSION.

The motion to affirm in this case is made upon the ground that the appeal is frivolous and merely taken for delay, which is the only ground upon which it could be based under the rules of the court. It is a matter of regret that the pendency of this motion leaves no alternative to the plaintiff-in-error but to present fully the arguments upon which it is contended that the judgment of the Maryland Court should be reversed. It is apparent upon the face of its opinion that the Maryland Court simply assumed that by reason of the case of St. Louis vs. Western U. Tel. Co., it was concluded from making a thorough examination of the case at bar or investigating the facts both of that case and the St. Louis case in order to ascertain whether they coincide. A writ of error or appeal must be presumed to be taken in good faith, and it is submitted that in this case, there is nothing to rebut that presumption. It would be impossible for this Court now to determine the question whether, upon the facts shown by the record in this case, the decision of the St. Louis case should control the case at bar, even were there no reasons assigned, which would win the consent of this Court to consider again the whole subject of this litigation. To come to such determination would require the Court to examine thoroughly the record of this case, and also that of the St. Louis case, and under the practice of the Court a question requiring such examination will not be decided upon motions. This Court has said:

> "It would seem to be clear that the present motion to dismiss cannot be determined without opening the record and looking

into the merits of the controversy, and it must therefore be denied."

Lynch vs. DeBernal, 131, U. S. App., xciv.

A fortiori where it is necessary that the record should be open and the merits of the controversy looked into, a motion to affirm would not be seriously considered, much less granted.

It is submitted that such a motion as this is excusable only in a case which turns entirely upon one or more points of law, which have been frequently decided by this Court. That a single decision upon a subject like that involved in this case should be made the foundation of a motion to affirm, because the writ of error is manifestly frivolous and taken for delay, and on the assumption that that decision would necessarily control this, without any examination into the facts and the constitution, statutes and ordinances, to ascertain how far the two cases agree or disagree, is it is submitted without precedent in the proceedings of this Court. Even if the two cases were similar in all respects, the existence of one case decided upon a point not argued, would not according to the practice of the Court preclude a second consideration of the same subject.

Another reason why this case should be retained for full argument, is that in the St. Louis case, upon the strength of which this motion is made, a decision has again been rendered in favor of the defendant by the Circuit Court of Missouri to which the case was sent back, and the case is now on its way back to this court, where it will be reached about the time of the argument of this case in regular course.

A new suit has been brought in Baltimore against the plaintiff-in-error for another year's tax and that case will go to the Court of Appeals, which will be asked to consider the defences resting on the Constitution and Laws of that State, and the decisions of that court itself which were ignored.

Another suit against the Western Union Company is pending in Baltimore, which having been removed to the U. S. Circuit Court will go thence to the Circuit Court of Appeals.

It is thus apparent that the public interest will be subserved and future litigation on the subject prevented by permitting a full argument of the subjecthere by all concerned.

It is submitted that the motions to dismiss and affirm should both be denied.

GEO. H. BATES,

Of Counsel for Plaintiff-in-Error.